TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925.

No. [redacted] 805

AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER,

vs.

THE COMMONWEALTH OF KENTUCKY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

PETITION FOR CERTIORARI FILED JANUARY 26, 1926.

ORDER GRANTING PETITION FILED APRIL 26, 1926.

(30,063)

(80,088)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 778

AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER,

vs.

THE COMMONWEALTH OF KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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[fol. a] **COURT OF APPEALS OF KENTUCKY**

AMERICAN RAILWAY EXPRESS COMPANY, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee

STATEMENT

1. The name of the Appellant is American Railway Express Company.

2. The name of the appellee is the Commonwealth of Kentucky.

4. The Judgment appealed from was rendered on the 3rd day of the May term of the Harlan Circuit Court, same being the 9th day of May, 1923, and will be found at page 29 of the record.

5. No Summons or warning order is desired.

6. The name- of attorneys for appellant *is* J. B. Snyder, Harlan, Kentucky; J. C. Adkins, Harlan, Kentucky; Stockton & Stockton, New York City.

7. The names of the attorneys for appellee are J. S. Forrester, Harlan, Kentucky; Thos. B. McGregor, Frankfort, Kentucky. J. B. Snyder & J. C. Adkins, of counsel.

[fol. 1] HARLAN CIRCUIT COURT

THE COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

AMERICAN RAILWAY EXPRESS COMPANY and ADAMS EXPRESS COMPANY, Defendants

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 2, 1923

The clerk of the Harlan Circuit Court is hereby ordered and directed to make a full and complete transcript of the entire record in this case for use on appeal of this case to the Court of Appeals of Kentucky.

Given under my hand this June 2, 1923.

J. B. Snyder & John C. Adkins, Attorneys for Defendant American Railway Express Co.

[File Endorsement omitted.]

HARLAN CIRCUIT COURT

[Title omitted]

PETITION IN EQUITY—Filed June 2, 1921

[fol. 2] The plaintiff, Commonwealth of Kentucky states that the defendant Adams Express Company, prior to June 30th, 1918, and up to that date was a joint stock company organized and authorized to do business under the laws of the State of New York, and prior to said date plaintiff herein had filed in the Harlan Circuit Court 44 petitions against the said defendant in which it was sought to recover from it separate fines in each of said cases in the sum of not less than $50.00, and not more than $200.00 on account of the allegation set out in said petition, that the defendant had violated Subsection 3 of Section 2569 B of Kentucky Statutes, and the defendant was properly before the Court on June 30th, 1918; that the defendant American Railway Express Company is a corporation organized under the laws of the State of Delaware on or about the 25th day of June, 1918, and as such corporation is engaged in the business of a common carrier, the same kind of business in which the defendant, Adams Express Company was engaged in prior to June 30th, 1918, hauling express and packages for hire. That at the January term, 1921, of this sourt 21 of said 44 cases against the defendant Adams Express Company came on for trial and same were tried and the plaintiff recovered from said defendant a judgment in the sum of $50.00 each on said 21 cases, amounting to $1,050.00, together with costs of $15.30 in each of said cases, amounting to $321.30, the judgment and cost at said term amounting to $1,371.30. That at the April term, 1921, of this Court the remaining 23 of said 44 cases against the defendant Adams Express Company were called for trial and were tried and the plaintiff recovered from said defendant a judgment in the sum of $50.00 each [fol. 3] in each of said 25 cases, amounting to $1,150.00 together with costs of $13.30 in each of said 23 cases, amounting to $305.90, said 23 judgments and costs amounting in all to $1,455.90, and all of said 44 judgments amount to $2,827.20. That on the 7th day of February, 1921, plaintiff had issued from the clerk's office of the Harlan Circuit Court execution on said 21 judgments for the amount thereof, being executions Nos. 1748 to 1805, both inclusive. That on the 9th day of May, 1921, it had issued from the Clerk's office of said court executions on said 23 judgments for the amount thereof, being executions Nos. 1854 to 1876, both inclusive, all of which executions were directed to the Sheriff of Harlan County and the first 21 of said executions were made returnable to the April Rule 1921, and said 23 executions were made returnable on the 4th day of July, 1921. All of said executions were delivered to the sheriff of Harlan County on the date that they were issued to do execution thereof and on the 30th day of March, 1921, said sheriff returned said 21 executions and on the 23rd day of May, 1921, said 23 executions were returned to the Clerk's Office of this court from whence

they issued, endorsed "No property found to make this Fi. Fa. from nor any part thereof. H. H. Howard, S. H. C. A copy of each of said executions and the officer's return thereon is filed herewith, as part hereof, and no part of either of said judgments has been paid.

Plaintiff further states that on or about June 25, 1918, the defendant, American Railway Express Company was organized for the express purpose of taking over and becoming the owner of all the property and rights of the defendant, Adams Express Company, and other Express Companies doing a railway express business in [fol. 4] the United States and on said date the defendant Adams Express Company, trasnferred and turned over all of its property of every kind and character, consisting of real estate, buildings, appurtenances, automobiles, horses, wagons, trucks, and materials and supplies, owned by it in the United States and in the State of Kentucky to the defendant, American Railway Express Company, receiving in lieu of said property thus turned over as only consideration therefor, $8,707,000.00 per value of the capital stock of the defendant, American Railway Express Company, no cash consideration at all and no property consideration of any kind having been paid to the defendant, Adams Express Company for said property; that the defendant, Adams Express Company was owned and the said $8,707,000.00 of the capital stock of the defendant, American Railway Express Company is now owned by individuals whose names are unknown to the plaintiff, all of whom are liable personally to the plaintiff herein for the full amount of said judgments; that on June 30th, 1918, the defendant, American Railway Express Company took charge of all of the property and business which the Adams Express Company had up to that date owned and been in possession of in Kentucky, which included the express office in Harlan, Kentucky. That the said Adams Express Company at that date owned and turned over to the defendant, American Railway Express Company property and business in Kentucky of the value of several hundred thousand dollars, including its office and business in Harlan, Kentucky, which alone had a monthly income of about $10,000.00, of which sum at least five thousand dollars was not income; that said property and business included offices and transportation business on all of the lines of the Louisville & Nashville Railroad [fol. 5] Company in Kentucky and since said date the defendant, American Railway Express Company has at all times and is now engaged in operation and doing the same business which the defendant, Adams Express Company was doing prior to said date and now has in its possession the same property and the same business which the said Adams Express Company had owned.

Plaintiff states that the defendant American Railway Express Company is now indebted to the said stockholders of the Adams Express Company in the sum in excess of $2,827.20 as an accumulation on the net earnings of said company which will be due to be paid as a dividend to the stockholders of the said Adams Express Company on said $8,707,000 capital stock.

Wherefore, plaintiff prays for a general order of attachment against the property of the defendants; that they each be required to

answer and discover any money, choses in action, legal or equitable interests or other property owned by or in which they have any interest, and that so much of any property discovered by the defendants as may be necessary, be subjected to the payment of plaintiff's judgments in the sum of $2,827.20 and the costs of this action and it prays for all proper and equitable relief, and for judgment against American Railway Express Company in the sum of $2,827.20 and the costs of this action.

Commonwealth of Kentucky, Plaintiff, by J. G. Forester, Commonwealth's Attorney.

[File endorsement omitted.]

[fol. 6] HARLAN CIRCUIT COURT

SUMMONS IN EQUITY AND RETURN

The Commonwealth of Kentucky to the Sheriff or any Constable of Harlan County:

You are commanded to summons Adams Express Co. American Railway Express Co. to answer in 10 days after the service of this summons, a petition in equity filed against them in the Harlan Circuit Court, by Commonwealth of Ky. and warn them that upon their failure to answer, the petition will be taken for confessed or they will be proceeded against for contempt, and you will make due return of this summons within 10 days after the service of same to the Clerk's office of this court.

Given under my hand as Clerk of said court, this 2" day of June, 1921.

M. W. Howard, Clerk, by Chas. G. Mutzenberg, D. C.

(Endorsed:) Executed on defendant, American Railway Express Company by delivering a true copy of this summons to A. Brock agent for it at its office and place of business in Harlan, Ky., and on deft. Adams Express Co., by delivering a true copy of this summons to W. J. Wilson who was its agent at Harlan, Ky. on July 1st, 1919 the date it ceased to do business in Kentucky and he being the agent on whom summons was served in the original suits filed herein against it and who was the last agent for the said defendant in Harlan county and it having no other officer or agent in Harlan County. This June 2nd, 1921.

[fol. 7] H. H. Howard, S. H. C., by J. J. Hensley, D. S.

HARLAN CIRCUIT COURT, SEPTEMBER TERM, 3D DAY, 7TH DAY OF SEPTEMBER, 1921

[Title omitted]

MINUTE ENTRY

This day came defendant, Adams Express Company and not entering its appearance, moved the court to quash the service of the summons herein as to it, attempted to be executed on W. J. Wilson, and filed the affidavit of Thomas J. Denugan treasurer of Adams Express Company in support of said motion. Came defendant American Railway Express Company and filed its general demurrer to the plaintiffs petition and without waiving said demurrer filed its separate answer herein.

HARLAN CIRCUIT COURT

[Title omitted]

AFFIDAVIT OF THOMAS J. DENEGEN

STATE OF NEW YORK,
County of New York, ss:

Thomas J. Denegen, being duly sworn, deposes and says that he is Treasurer of the Adams Express Company, a joint stock association organized under the common law of the state of New York, one of [fol. 8] the defendants herein.

That he is familiar with the personnel of all the employees of the Adams Express Company; that W. J. Wilson was not in the employ of Adams Express Company during the months of May and June, 1921, at Harlan, Ky., or elsewhere, and that the said W. J. Wilson has not been in the employ of the said Adams Express Company at any time since July 1st, 1918.

That the said W. J. Wilson is not, nor has he at any time since July 1st, 1918, been authorized to accept service of proceed on behalf of the said Adams Express Company in this action or any other action in which it is defendant.

Thomas J. Degnen.

Notary's certificate omitted.

HARLAN CIRCUIT COURT

[Title omitted]

MOTION TO QUASH SERVICE OF PROCESS—Filed September 7, 1921

The defendant Adams Express Company, alone, not entering its appearance to this action, moves the court to quask the service of

process herein as to it, and to quash the service of summons herein [fol. 9] executed on W. J. Wilson on June 2, 1921; and it tenders herewith the affidavit of Thomas J. Degnen, in support of said motion, same being marked "A."

It prays the judgment of the court on its motion.

Zeb A. Stewart, Attorney for Adams Express Company for this motion.

[File endorsement omitted.]

HARLAN CIRCUIT COURT

[Title omitted]

GENERAL DEMURRER OF AMERICAN RAILWAY EXPRESS COMPANY—Filed September 7, 1921

The defendant American Railway Express Company alone, demurs generally to the plaintiffs petition, because the same does not state facts sufficient to constitute or support a cause of action against it.

Zeb A. Stewart, Attorneys for American Railway Express Company.

[File endorsement omitted.]

HARLAN CIRCUIT COURT

[Title omitted]

SEPARATE ANSWER OF AMERICAN RAILWAY EXPRESS COMPANY—Filed September 7, 1921

1

[fol. 10] The defendant American Railway Express Company not waiving its demurrer, but still insisting and relying on same for answer to the plaintiff's petition, denies that on or about June 25, 1918, it was organized for the express purpose of taking over and becoming the owner, or either, of all the property and rights, or either, of the Adams Express Company and other express companies or any of them, and denies that the Adams Express Company transferred and turned over to it (The American Railway Express Company) all of its property of every kind and character owned by it in the United States or in the State of Kentucky; and defendant denies that the Adams Express Company received in lieu of such property as the only consideration therefor the sum of eight million seven hundred and seven thousand dollars par value of the capital stock of the American Railway Express Company.

Defendant denies that its capital stock or any part thereof, is owned by individuals all or any of whom are personally liable to the plaintiff for said judgments, fines or costs or any part thereof.

Defendant denies that the Adams Express Company turned over to this defendant property a*b*d business in Kentucky of the value of several hundred thousand dollars, and denies that its office and business at Harlan had a monthly net income of five thousand [fol. 11] dollars ($5,000.00) or any amount whatever.

Defendant denies that it is now, or was at the time of the filing of the petition herein indebted to the stockholders of the Adams Express Company in a sum in excess of $2,827.20; or in any sum or amount as a- accumulation of the net earnings of the said Company, or which will be due to be paid as dividends to the Stockholders of the Adams Express Company on said eight million seven hundred and seven thousand dollars capital *sot*ck; and denies that it is indebted *ot* the stockholders of the Adams Express Company in any sum whatever; and it denies that no cash consideration at all, or no property consideration of any kind was not paid to the defendant, Adams Express Company for said property.

2

This answering defendant alleges by way of affirmative defense to the plaintiff's petition, that on or about June 25, 1918, it was organized upon the requirement of the Director General of Railroads, in charge of all railroad lines under Federal control for the express purpose of becoming the sole agent of the Director General for the conduct of the express business in the United States, and that it purchased as of June 30, 1918, from the Adams Express Company and other express companies in the United States and in the State of Kentucky only such part of the property of said express companies as was required for the operation of said express business at the actual value of said property, paying for same with its stock at par and selling for cash to said Adams, and other express companies three million ($3,000,000.00) dollars par value of such capital stock, and that it issued all of its said capital stock upon the direction of, or with the approval of the said Director [fol. 12] General.

Defendant further alleges that it was not permitted by the said Director General to assume, and did not assume, any of the debts or obligations of the said Adams Express Company or any other Express Company, either civil or criminal, and especially did not assume the obligations or alleged obligations sued on herein.

Defendant alleges that prior to June 18, 1918 the Director General of Railroads notified the Adams Express Company and the other principal Express Companies doing business in the United States of America, that he, said Director General of Railroads, would not adopt the contracts which they had with the railroad companies prior to General Control of Railroads, but that he would only contract with a single express company which should operate and transact business over all the railroads under Federal control,

and that if such a corporation were organized the said Director General of Railroads would contract with said corporation for the transaction by said corporation of the express business over all the railroads under Federal control, and would employ such corporation as his agent for the transaction of such business as a Federal Agency or instrumentality and that, accordingly the Adams Express Company and all the other express companies which had transacted business over the railroads of which the President of the United States had taken control for the prosecution of the War with the Central Powers of Europe, were compelled to and did dis-continue the express business and sold to the defendant the American Railway Express Company, such of their tangible property in the state of Kentucky, and other states as was required by defendant American Railway Express Company, and that, accordingly, the Adams Ex- [fols. 13 & 14] press Company, sold to said defendant American Railway Express Company all its tangible property used in the express business in Kentucky known to this defendant American Railway Express Company, for the sum of eight million seven hundred and seven thousand dollars ($8,707,000.00) which was the price of all the tangible property of the Adams Express Company sold to this defendant, and which was paid for in the capital stock, at par, of said defendant American Railway Express Company, and that all the capital stock issued after the purchase of said property of said Adams Express Company, was issued pursuant to the direction and under the control of said Director General of Railroads, and that this defendant was not permitted by the said Director General to assume, and did not assume, any of the debts, or obligations of the said Adams Express Company or any other Express Company either civil or criminal, and that the conditions and exegencies of this defendant, as an Agent and instrumentality of said Director General of Railroads in the operation of said express company forbade this defendant to assume or become responsible for any of the obligations of the said Adams Express Company or said other express companies, whose property, or part of whose property, had been transferred to this answering defendant; and that to hold this defendant liable for the debts of said other express companies, or any of them, would thwart the purpose of said Director General and impair the efficiency of this defendant as an Agent or instrumentality of said Director General and obstruct the transaction by this defendant of the express business of said Director General essential to the prosecution of the war aforesaid with said [fol. 15] Central Powers.

The defendant says that the said tangible property of the said Adams Express Company and said other express companies sold to defendant, American Railway Express Company was indespensible to the exegencies of the Director General of Railroads for the operation of the said Express business of this defendant in the prosecution of the War aforesaid with the Central Powers of Europe, and the immunity of this defendant from liability for the debts of the Adams Express Company and said other express companies, and of this defendant's property from liability to be levied upon, attached or sold for the debts of said other companies was indispen-

sible to the proper and complete efficiency of this defendant as Federal Agent and instrumentality of said Director General of Railroads.

3

This answering defendant for further answer and defense alleges that the plaintiff in this action is acting in a Governmental capacity in seeking out the property of this defendant for the debt, of another, to-wit: The Adams Express Company; and that the subjection of the property of this defendant to said debts of said Adams Express Company would deprive this defendant of its property without due process of law, and deny to it the equal protection of the laws contrary to the constitution of the United States, and especially section one (1) of the Fourteenth (14) Amendment thereof, and contrary to the Constitution of the State of Kentucky.

Wherefore, the premises considered, the defendant pleads and relies upon said Federal Agency as an exemption under the debt of [fol. 15½] the Adams Express Company, sued on in this action, and invokes the protection of the Constitution and laws of the United States and the State of Kentucky in such behalf; and it prays that plaintiff's petition may be dismissed and that it take nothing thereby, and it prays for all general, special, equitable, necessary and proper relief.

Zeb A. Stewart, Attorney for American Railway Express Company.

Jurat showing the foregoing was duly sworn to by Zeb A. Stewart; omitted in printing.

[File endorsement omitted.]

HARLAN CIRCUIT COURT

[Title omitted]

ORDER RE EVIDENCE IN FORMER CASE—September 9, 1921

[fol. 16] On motion of plaintiff and by agreement of the parties the evidence taken and filed in the former case of the Comth of Ky. vs. Adams Express Company now pending in the Supreme Court of the United States may be filed read and considered as evidence on the trial of this case and by further agreement this cause is now continued.

HARLAN CIRCUIT COURT

[Title omitted]

Continued until the next terms of this court.

HARLAN CIRCUIT COURT

[Title omitted]

Came the plaintiff and filed a general demurrer to the second and third paragraphs of the answer herein.

HARLAN CIRCUIT COURT

[Title omitted]

DEMURRER AND REPLY—Filed May 7, 1923

The plaintiff demurs to the answer of American Railway Express Company filed herein and to each of the three paragraphs of said [fol. 17] answer, because the answer as a whole and each paragraph separately do not constitute any valid defense to the cause of action set out in the petition.

Not waiving its demurrer, but insisting on same, plaintiff for reply to the answer of American Railway Express Co., and first to the second paragraph thereof denies that said defendant was organized upon the requirement of the Director General of Railroads, or for the purpose of becoming the sole or any agent of said Director General of Railroads; or that it purchased as of June 30th, 1918 or purchased at all at any time from Adams Express or any other express company in the United States or in Kentucky any property of said express companies at the actual value thereof or for any value at all; or that it issued its stock or any stock with approval of the Director General; or that it was not permitted by said Director General to assume, or did not assume any of the debts or obligations of Adams Express Company, or any other express company, or that it did not assume the obligation sued on herein.

Denies that prior to June 30th, 1918, the Director General of railroads notified, or at all notified, the Adams Express Company, or any other express company doing business in the United States, that he would not adopt the contract which they had with the railroad companies prior to Federal Control of railroads, or that he would only contract with a single express company which would operate and transact business over all the railroads under Federal Control or that if such a corporation was organized the said Director General would contract with such corporation for the transaction by such

corporation of the express business over all the railroads under Fed-
[fol. 18] eral control or would employ such corporation as its agent for the transaction of such business as a Federal Agency or instrumentality, or that the Adams Express Company, or any other express company which had transacted business over the railroads of which the President of the United States had taken control for the prosecution of the war with the Central Powers of Europe, were compelled to discontinue the express business or sold to defendant, the American Railway Express Company such of their tangible property, or any of their tangible property in the State of Kentucky, or other states as was required by defendant American Railway Express Company, or that accordingly, or at all, the Adams Express Company, sold to said defendant, or sold at all, to American Railway Express Company, all or any of its tangible property used in the express business in Kentucky. It admits that said Adams Express Company did turn over to defendant American Railway Express Company tangible property in Kentucky and in the United States of the value of $8,707,000.00, but denies that said transaction was a sale or anything but a temporary consolidation of the Adams and other express companies by which they made the said American Railway Company their agent to transact their business during the war only; or that the capital stock of said defendant was issued under the direction or control of the Director General of Railroads, or that said defendant was not permitted by said Director General of Railroads to, or did not assume the debts and obligations of the Adams Express Company or all of the constituent express companies composing said temporary consolidation; or that the conditions or al-
[fol. 19] leged exegencies of said defendant as agent or instrumentality of said Director General of Railroads in the operation of said express companies forbade this defendant to assume or become responsible for the debts or obligations of said Adams Express Company or other express companies composing said consolidation whose property had been transferred to the defendant American Railway Express Company, or that to hold said defendant liable for said debts and obligations would t-wart the purpose or intention of said Director General of Railroads or impair the efficiency of said defendant as an agent of said Director General, or obstruct the transaction by said defendant of the business of said Director General of Railroads, essential to the prosecution of the war with said Central Powers; plaintiff denies that the Director General of Railroads was a party to or had in view any scheme to repudiate the debts or obligations of any of the old express companies including the Adams, or to aid or encourage the defendant American Railway Express Company to asist or be a party to such scheme of repudiating such debts or obligations, or that he had any authority to do so; plaintiff again denied that any of said property of the Adams was sold to defendant American Railway Express Company, or transferred for any other purpose of making said defendant its agent, or that it was such an act as renders or that did render said defendant American Railway Express Company immune from paying the debts or ob-

ligations of said old express companies, or that the alleged sale or transfer of the tangible property of the Adams or other express companies was indispensable to the exigencies of the Director General of Railroads, for the operation of the express business of the defendant [fol. 20] in the prosecution of the War, rendered the property transferred immune from liability for the debts of said Adams Express Company or any other express company, so that same could not be levied on, attached or sold for debts, or that such arrangement was indispensable to the proper or complete efficiency of said defendant as Federal Agent or instrumentality of said Director General of Railroads.

For reply to the second paragraph of the said answer plaintiff denies that it is acting in a governmental capacity in seeking out the property of defendant for the debt of another, Adams Express Company, or any other person; or that it is trying to subject the property of the defendant American Railway Express Company to the debt of the Adams Express Company, but is trying only to discover the property of the said Adams Express Company and to prevent the defendant American Railway Express Company from hiding it behind the cover of the actions of the Director General of Railroads or otherwise; and it denies that to require the said defendant to pay the debt sued on would be depriving it of its property without due process of law or deny it *of* equal protection of the laws contrary to the constitution of the United States or of Section 1 of the Fourteenth Amendment thereof or contrary to the constitution of the State of Kentucky.

Paragraph 2

For an affirmative defense or avoidance of the attempted defense set up in second paragraph of the answer of the defendant American Railway Express Company, plaintiff states that the alleged purchase [fol. 21] of the tangible property of the Adams Express Company and other express companies by which they did on or about June 21st, 1918, agree to organize the defendant American Railway Express Company as an agent or means of carrying on the Express business which the several old companies had been carrying on and pursuant to said agreement which was in writing, the said defendant was organized and the tangible property of the Adams including also over $900,000.00 in cash was temporarily transferred and consolidated with said other express companies during the World War only and after the World War part of said old express companies withdrew from said temporary arrangement but the Adams did not withdraw and on or about August 18th, 1918, after the war, the defendant American Railway Express Company filed written application with the Interstate Commerce Commission at Washington, D. C., under one of the provisions of the Transportation Act of Congress passed in 1920, requesting that "The four" Express Companies, including the Adams Express Company, should be permitted to consolidate into one company or corporation, to-wit: The American Railway Express Company and afterwards on or about December 7th, 1920, said Interstate Commerce Commission acted on said application after having

fully heard same and made an order permitting said four express companies to consolidate under one corporation, the defendant American Railway Express Company and it was after that date that the said organization or consolidation of said Adams and three other express companies were consolidated into the defendant American Railway Express Company.

Plaintiff further states that on or about June 26th, 1918, the defendant American Railway Express Company entered into written [fol. 22] contract with the Director General of Railroads to carry its express transportation over the railroads then under Federal Control and by said contract it was provided that the defendant would not, except with the approval of the Director General, in any action at law or in equity make the defense that it was an instrumentality or agent of the federal government: that the Director General of Railroads never did give his approval authorizing the defendant to interpose such defense and the plaintiff says the defendant is estopped from setting up such defense in this action.

Wherefore plaintiff prays judgment as in its petition.

The Commonwealth of Ky., Plff., by B. B. Golden, Comth.'s Atty. 26th Judicial Dist. of Kentucky, and J. S. Forester.

[File endorsement omitted.]

HARLAN CIRCUIT COURT

[Title omitted]

ORDER OVERRULING DEMURRER TO PETITION—9th Day of May, 1923

This cause came on for hearing on the general demurrer of the American Railway Express Company to the petition of the plaintiff, and the court considering said demurrer, and being advised overruled the same, to which the defendant at the time excepted.

[fol. 23] HARLAN CIRCUIT COURT, 9TH DAY OF MAY, 1923

[Title omitted]

Came the attorneys for defendant and produced and filed an amended answer, and by agreement of the parties the affirmative matter set out therein is controverted of record.

HARLAN CIRCUIT COURT

[Title omitted]

AMENDED ANSWER OF THE AMERICAN RAILWAY EXPRESS COMPANY —Filed May 9, 1923

Comes the defendant, American Railway Express Company, and for amendment to the second paragraph of the answer heretofore filed, states that the defendant, Adams Express Company, did not sell, or convey all of its assets to the defendant American Railway Express Company; that the Adams Express Company retained approximately 50 per cent of its said assets, and that it has not taken any steps toward its dissolution, and it — not in process of dissolution at the present time. The defendant, American Railway Express Company upon information and from their belief states that it is not the intention of the said Adams Express Company to liquidate its assets or to dissolve itself in the future; that the said Adams Express Company is now engaged in the business for profit in the City of New York, State of New York, in the carriage of money and securities, and contemplates extending its activities, along said line, to [fol. 21] other cities and places in the United States.

Wherefore, defendant, American Railway Express Company, prays as in its answer filed heretofore.

J. B. Snyder, J. C. Adkins, Stockton & Stockton, Attys. for Defendant.

[File endorsement omitted.]

HARLAN CIRCUIT COURT, 9TH DAY OF MAY, 1923

[Title omitted]

ORDER SUSTAINING DEMURRER TO ANSWER

This cause came on for hearing upon the general demurrer filed by the plaintiff to the second and third paragraphs of the separate answer as amended of the defendant, American Railway Express Company, and the court considering the said general demurrer to said second and third paragraphs of the answer as amended, and being advised, sustained same. To which ruling of the court, the defendant, American Railway Express Company, at the time excepted.

HARLAN CIRCUIT COURT, 9TH DAY OF MAY, 1923

[Title omitted]

[fol. 25] Came the attorneys for the defendant, and produced and filed the agreed evidence of K. E. Stockton.

HARLAN CIRCUIT COURT

[Title omitted]

ORDER OVERRULING DEMURRER TO REPLY—9th Day of May, 1923

Came the defendant, American Railway Express Company and produced and filed its general demurrer to the second paragraph of the reply of the plaintiff herein, and the court considering said demurrer overruled the same, to which ruling of the court the defendant at the time excepted.

HARLAN CIRCUIT COURT

[Title omitted]

GENERAL DEMURRER TO THE SECOND AND THIRD PARAGRAPH OF THE REPLY—Filed May 9, 1923

Comes the defendant, American Railway Express Company, by attorney, and demurs generally to the second paragraph of the reply, filed herein, because same does not state facts sufficiently to constitute a valid, or any defense to the plea of the defendant's answer, and

Prays the judgment of the court hereon.

J. B. Snyder, J. C. Adkins, Stockton & Stockton, Attorneys for Defendant.

[File endorsement omitted.]

HARLAN CIRCUIT COURT

[Title omitted]

ORDER OVERRULING MOTION TO STRIKE FROM REPLY—9th Day of May, 1923

Came the defendant, American Railway Express Company and produced and filed its motion to strike parts of the reply of the plaintiff beginning with the word "plaintiff" in the second line of page

6 and ending with the word "action" in the last line thereof, because same was irrelevant, and redundant, and the court considering said motion to strike, overruled the same to which ruling of the court the defendant at the time excepted.

[fol. 26] HARLAN CIRCUIT COURT

[Title omitted]

MOTION TO STRIKE PARTS OF THE REPLY—Filed May 9, 1923

Comes the defendant, American Railway Express Company, and moves the court to strike from the reply of the plaintiff filed herein, the following matter, to-wit: Beginning with the word "plaintiff" in the second line on page 6 thereof, and ending with the word "action" in the last line thereof, because same is irrelevant, redundant, and [fol. 27] does not constitute any estoppel to the plea of the defendant herein, and

Prays the judgment of the court thereon.

J. B. Snyder, J. C. Adkins, Stockton & Stockton, Attys. for Defendant American Railway Express Co.

[File endorsement omitted.]

HARLAN CIRCUIT COURT

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS

Came the defendant, American Railway Express Company by attorney and filed its written motion to the court to dismiss this action upon the face of the pleadings, proof and papers filed, because it is sought in said action to take and appropriate the property of the defendant, without due process of law, and because the defendant, American Railway Express Company is thereby denied the equal protection under the law *by* which *are* afforded to all persons and corporations under the law by Section 1 of the 14th Amendment of the Constitution of the United States. And the court considering said motion, overrules the same, to which ruling of the court the defendant, American Railway Express Company at the time excepted.

[fol. 28] HARLAN CIRCUIT COURT

[Title omitted]

MOTION TO DISMISS THE CASE UPON THE FACE OF THE PAPERS—Filed May 9, 1923

Comes the defendant, American Railway Express Company, by attorneys, and moves the court to dismiss this action upon the face of the pleadings, proof and papers, on file, because in said action it is sought to take and appropriate the property of the defendant, without due process of law, and because it is denied the equal protection of the laws as guaranteed by section 1 of the 14th amendment to the Constitution of the United States.

Wherefore, the defendant, American Railway Express Company prays the judgment of the court.

J. B. Snyder, J. C. Adkins, Stockton & Stockton, Attorneys for Defendant American Railway Express Co.

[File endorsement omitted.]

HARLAN CIRCUIT COURT

[Title omitted]

SUBMISSION OF CAUSE—9th Day of May, 1923

By agreement of the parties, this cause is now submitted upon the [fol. 29] whole case for judgment.

HARLAN CIRCUIT COURT

[Title omitted]

JUDGMENT—9th Day of May, 1923

This case having been submitted for judgment and the court having read and considered the pleadings and proof on file and being advised adjudges that the plaintiff, The Commonwealth of Kentucky, recover from the defendant, American Railway Express Company, the sum of Twenty-eight Hundred Twenty-seven and 20/100 Dollars ($2,827.20) with interest thereon at the rate of six per cent per annum from June 2nd, 1921 until paid and its costs herein expended. This judgment when satisfied will be in satisfaction of the 14 judgments rendered against the defendant Adams Express Company at the January and April terms of this court 1921 which judgments and costs amount to the sum of $2,827.20, the amount of the judgment

hereby rendered against the defendant American Railway Express Company and which judgments were rendered in favor of the plaintiff against the said Adams Express Company for the satisfaction of which this suit was prosecuted. To all of the foregoing judgments the defendant, American Railway Express Company objects and excepts and prays an appeal to the Court of Appeals which is granted and this case is stricken from the docket.

[fol. 30] THE HARLAN CIRCUIT COURT

[Title omitted]

STIPULATION RE TESTIMONY

The deposition of W. B. Clark, taken at the law offices of Stockton & Stockton, at 51 Broadway, New York City, New York, on Tuesday October 14, 1919, to be read as evidence on behalf of the defendants on the trial of the above-styled action, now pending in the Harlan Circuit Court.

It is agreed by and between the attorneys for the plaintiff and the defendants that the depositions of the witnesses W. B. Clark and Thomas J. Degnon may be taken before Joseph A. McLaughlin, a Notary Public, instead of *of* before Edwin R. Whittingham, the Notary specified in the notice herein; and it is further agreed that the depositions may be taken in shorthand and transcribed by the Notary or stenographer into type script on the typewriter, and that the signatures of the witnesses may be waived.

Said depositions herein are taken pursuant to notice of October 2, 1919, and any irregularities in the taking or certifying of same may be waived by agreement except as to the relevancy, materiality and competency of said testimony:

Present and representing the plaintiff: Judge J. S. Forester, of Harlan, Kentucky.

[fol. 31] Present and representing the defendants: Stockton & Stockton, of New York City, and Zeb A. Stewart, of Harlan, Kentucky.

Said witness W. B. CLARK, being duly sworn and interrogated by Zeb A. Stewart, deposes as follows:

Q. You may state your name, age, residence and occupation?

A. W. B. Clark; 35; Ridgewood, New Jersey; Assistant Secretary of the American Railway Express Company.

Q. How long have you been acting in the capacity of Assistant Secretary of the American Railway Express Company?

A. Since June 25, 1918.

Q. As such officer, state whether or not you are reasonably familiar with its transactions and business with reference especially to

the sale and transfer of the property or of certain property of the Adams Express Company to the American Railway Express Company?

A. I am familiar with it.

Q. It is alleged in the plaintiff's petition that on or about June 25, 1918, the Adams Express Company transferred and turned over all of its property of every kind and character consisting of real estate, buildings, appurtenances, automobiles, horses, wagons, trucks, materials and supplies owned by it in the United States and in the State of Kentucky to the defendant the American Railway Express Company. You will please state whether or not, first, it is true that this transfer of this property from the Adams Express Company to the American Railway Express Company in the State of Kentucky was made?

A. On July 1, 1918, the American Railway Express Company purchased from the Adams Express Company and other express [fol. 32] companies all of their tangible property used or formerly used in express transportation operations throughout the United States, including such tangible property theretofore operated in the express transportation business of the Adams Express Company in the state of Kentucky.

Q. Is it or not true, as alleged in the petition, that the Adams Express Company transferred all of the aforementioned property in the United States to the American Railway Express Company; that is, state whether or not the Adams Express Company sold and transferred at this time to the American Railway Express Company all of its property in the United States?

A. The Adams Express Company sold and transferred for a valuable consideration to the American Railway Express Company all of its tangible property used in express operations throughout the United States.

Q. State, if you know, what property, if any, either real or personal, tangible or intangible, that the Adams Express Company did not transfer at this time to the American Railway Express Company?

A. I have no knowledge.

Q. It is alleged that the consideration for the transfer of the property mentioned in the petition was $8,707,000 par value of the capital stock of the defendant American Railway Express Company and, further, that no cash consideration at all was paid. Please state whether or not this is true?

A. It is not. The Adams Express Company in addition to the sale of its tangible property used in express operations to the American Railway Express Company, also purchased for cash some of the stock of the American Railway Express Company at par.

[fol. 33] Q. Then, if I understand your answer, there was a cash payment made as the consideration or at least a part of the consideration for the transfer of this property?

A. There was a cash consideration made, on behalf of the Adams Express Company, in the purchase of the capital stock of the American Railway Express Company.

Q. It is further alleged in the plaintiff's petition that the American Railway Express Company was at the time of the filing of the petition herein, July 12, 1919, indebted to the stockholders of the Adams Express Company in the sum of in excess of $4,110.10 as accumulations of the net earnings of said Company which would be due to be paid them as dividends on $8,707,000 of capital stock. State whether or not this is true?

A. It is not true.

Q. Did I understand you to mean by your answer to this question that the American Railway Express Company was not or is not indebted to the stockholders of the Adams Express Company for the sum named in the question as dividends on stock which they hold in the American Railway Express Company?

A. There has been no dividend declaration whatever, and therefore there is no obligation on the part of the American Railway Express Company to pay any stockholders any dividends.

Q. I believe that you may state in you- own way for the information of the court a brief history leading up to the sale and transfer of the property of the Adams Express Company in Kentucky to the American Railway Express Company.

A. Upon the advent of federal control of the railroads by the United States Railroad Administration in the closing days of 1917, consideration was given by the executives of the express companies [fol. 34] then existing as to the status of their operating contracts with the individual railroads in view of the fact that their control had been assumed by the federal Government. After continued negotiations at Washington, the Director General of Railroads advised the executives of the Express Companies that he would not deal with more than one Express Company to operate over all federal controlled lines in the United States. Therefore, the old express companies were estopped from the right to carry on the express transportation business beyond June 30, 1918. Thereupon a new corporation was organized by name of American Railway Express Company which was successful in concluding a contract with the United States Railroad Administration for the operation of the express service over federal controlled lines throughout the United States, such contract to become operative on July 1st, 1918. The old Express Companies having no use for the tangible property used by them in the express transportation business and the new company having great need for this identical property, which in many respects is peculiar to the express transportation business, the old express companies negotiated for the sale and the American Railway Express Company for the purchase of this tangible property used in express transportation over all the lines formerly operated by the old express companies, and this purchase and transfer of this tangible property was effected at midnight June 30, 1918, for a valuable consideration on the part of the American Railway Express Company, thereby enabling it to continue the express transportation business without interruption.

[fol. 35] Q. I will ask you to state whether or not the Adams Express Company as a corporation, or rather a joint stock company, is or not still in existence with executive officers?

A. The Adams Express Company is still in existence as a separate entity, with executive offices and officers in New York City.

Q. State whether or not any of the executive officers of the Adams Express Company are or are not officers in the American Railway Express Company?

A. None of the officers of the Adams Express Company are officers of the American Railway Express Company.

Q. Are there any employes to your knowledge of the Adams Express Company who are at this time also employed of the American Railway Express Company?

A. No.

Q. Is there or not any contract in existence between the Adams Express Company and the American Railway Express Company by the terms of which the American Company has agreed, assumed, contracted and undertaken to pay the liabilities, debts and judgments of the Adams Express Company?

A. There is not and has not been such a contract.

Q. Is there or not to your knowledge any agreement, contract, undertaking or understanding between these two companies that the American Railway Express Company will assume and pay off the 59 judgments rendered by the Harlan Circuit Court and sued on herein against the Adams Express Company?

A. There has not been and is not such a contract in effect.

[fol. 36] Q. State whether or not, if you know there is any surplus money or funds in the hands of the American Railway Express Company available for the payment of dividends on the stock of the American Railway Express Company held by the Adams Express Company?

A. There are no accumulations of these moneys.

Q. In the contract or bill of sale to which you referred between these two companies what provision or stipulation, if any, was made as to who should pay and discharge the obligations and liabilities of the Adams Express Company?

A. There was no reference thereto whatever.

Q. State whether or not the American Railway Express Company now has or holds any money, property, choses in action, legal or equitable interests due the Adams Express Company?

A. It has not.

Q. If I have understood you correctly, the sale and transfer of the property of the Adams Express Company in Kentucky to the American Railway Express Company was not a matter of choice, but was done as a matter of necessity at the direction of the government. Is that correct?

A. I would say not. The Adams Express Company could choose to whom it should dispose of its property and, through a mutual agreement, choose to sell it to the American Railway Express Company, it being property that was in a good many respects peculiar to the express transportation business and could not be used to advantage by any other kind of business.

Q. What I mean by my question is whether or not the American Railway Express Company was organized as a matter of necessity in

order to transact the express business of the United States by reason [fol. 37] of the decision of the Director General of Railroads?

A. It was necessary that some form of corporation or company should carry on the express transportation business without interruption and the American Railway Express Company was formed for that purpose.

Q. Has the American Railway Express Company or not never paid from its own funds or moneys any of the obligations or liabilities of the Adams Express Company in any form whatever?

A. It has not.

Mr. Kenneth Stockton:

Q. At various times has the American Railway Express Company rendered statements of account for money due it from the Adams Express Company to your knowledge?

A. It has not.

Cross-examination by Judge Forrester:

Q. The American Railway Express Company was incorporated about the 25th day of June, 1918. Of course, it had not, prior to that time, been engaged in any kind of business or owned any property?

A. It was not in existence prior to June 20, 1918, the date it was incorporated.

Q. On July 1, 1918, or about that date, did the American Railway Express Company own any property or have any assets of its own before the property of the other express companies was transferred to it?

A. It had not.

[fol. 38] Q. What other express companies besides the Adams transferred their property to the American Railway Express Company?

A. The Adams Express Company, Wells Fargo & Company, The American Express Company, the Southern Express Company, Great Northern Express Company, Northern Express Company and Western Express Company sold their tangible property used in the express operations to the American Railway Company.

Q. What was the whole consideration for this property purchased from these various express companies by the American Railway Express Company?

A. Approximately $33,000,000.

Q. And what was the invoiced or agreed price of the property of the Adams Express Company turned over to the American Railway Express Company?

A. The depreciated book value of each individual piece of property on July 1, 1918.

Q. And what did that amount to in dollars.

A. Why, in round numbers, $8,000,000.

Q. Have you any information from which you can state the value

of this property owned by the Adams Express Company in Kentucky on that date July 1, 1918.

A. I have not the information segregated as to states.

Q. I believe you have stated that the Adams Express Company bought some stock and paid cash for it from the American Railway Express Company. How much of the stock did the Adams buy and pay cash for?

A. In round numbers between three-quarters of a million and one million dollars.

Q. And was there no writing of any kind between these express [fol. 39] companies, especially the Adams, to turn the property over to the American Railway Express Company, or verbal agreements by which the then existing obligations and liabilities of the express companies for transferring their property to the American Railway Express Company should be taken care of or paid.

A. There was no contract or agreement of any sort whereby the American Railway Express Company agreed to assume any of the debts or outstanding liabilities of any of the old express companies.

Q. What tangible property, if any, has the Adams Express Company at this time:

A. I have no definite knowledge what tangible property, if any, was retained by it at the time this property was taken over by the American Railway Express Company July 1st, 1918. Any and all property not used in the express transportation business.

Q. Do you know of any tangible property or money which it did retain and did not transfer to the American Railway Express Company.

A. Not being connected with the Adams Express Company, I am not qualified to answer.

Q. The Adams Express Company, as I understand, was a joint stock company and not a corporation. Do you know who the stockholders of the old stock company were or do you know any of them?

A. I am not qualified to answer that.

[fol. 40] Q. The Commonwealth of Kentucky desires to collect these judgments in these cases from the Adams Express Company if they can find any property out of which to make this collection. Can you give me any information of any property of any kind which the Adams Express Company owns out of which the judgments sued on herein can be met?

A. I can not give you any information with respect to any of the Adams Express Company's matters at the present time.

Q. Do you know whether or not any citizen of Kentucky was a stockholder of the Adams Express Company on July 1, 1918?

A. I have no knowledge.

Q. Do you know whether or not the American Railway Express Company has on hand any surplus earnings of any kind for any purpose?

A. The American Railway Express Company has no surplus earnings on hand for any purpose.

Q. Is it losing money or making money?

A. The American Railway Express Company has lost money ever since it started in business.

Q. What did the American Railway Express Company do with the three-quarters of a million dollars which you say the Adams stockholders paid for stock in the American Railway Express Company?

A. The cash subscription which was made in the American Railway Express Company for capital stock was used as a working fund with which to carry on its business, purchase supplies and generally to maintain its property.

Q. What other express companies outside of the Adams had any [fol. 41] property in Kentucky that was transferred to the American Railway Express Company?

A. My knowledge would lead me to believe that Wells Fargo & Company, the American Express Company and the Southern Express Company had property in the state of Kentucky.

Q. Can you reasonably find out the value of the Adams Express Company's property that was turned over in Kentucky to the American Railway Express Company?

A. No. I cannot. It was all bulk.

Q. Was there any written agreement between these various express companies to turn the property over to the American Railway Express Company at all?

A. The only understanding was that the old companies had to get rid of their property or else store it. There was no place to store it and they wanted to realize upon it. They sold it to the American Railway Express Company by agreement.

Q. Was there any order of the President or the Director General of Railroads forcing these companies to dispose of their property to the American Railway Express Company?

A. Not to my knowledge.

Q. To whom was the eight million dollars or more stock of the American Railway Express Company, which represented the value of the property of the Adams Express Company, turned over?

A. To the Adams Express Company.

Q. Was it turned over to the individual stockholders of the Adams Express Company or to the Adams Express Company as a joint stock company.

A. To the Adams Express Company as a joint stock company.

[fol. 42] Also the deposition of THOMAS H. DEGNON, taken at the same time and place and for the same purpose and under the same agreements and stipulations as stated in the caption of the deposition of W. B. Clark.

Said witness, being duly sworn, and interrogated by Kenneth E. Stockton, deposes as follows:

Q. State your name, age, residence and occupation.

A. Thomas J. Degnon; age 44; residence 18 South Ninth Street, Newark, New Jersey; occupation Treasurer Adams Express Company.

Q. How long have you been Treasurer of Adams Express Company, Mr. Degnon?

A. Since June 1st, 1918.

Q. Were you with the Adams Express Company before that date?

A. I was.

Q. In what capacity?

A. As assistant to the President.

Q. Did your duties require you to become familiar with the general operations and policy of the company?

A. They did.

Q. Are you familiar with the transfer of the property by the Adams Express Company to the American Railway Express Company?

A. I am, with the arrangements between the companies—yes.

Q. Please state whether or not you know whether the Adams Ex-
[fol. 43] press Company ceased to do an express business on July 1, 1918?

A. It did cease.

Q. Is the Adams Express Company still in existence?

A. Yes.

Q. To your knowledge has there been any application made to any judicial or state authorities for the dissolution of the Adams Express Company?

A. No such application has been made.

Q. Please state whether or not, if you know, the Adams Express Company at the time of the transfer of the property used in the Express business in the United States to the American Railway Express Company transferred its entire assets, tangible and intangible, of every description to the American Railway Express Company?

A. It did not.

Q. Were there any assets reserved by it at the time of this transfer?

A. There were.

Q. Do you know whether there was any agreement or understanding between the Adams Express Company and the American Railway Express Company whereby the latter agreed to assume any of the debts or obligations of the Adams Express Company?

A. Not to my knowledge.

Q. Do you know as a matter of fact whether the American Railway Express Company has ever actually assumed or paid any of the debts or obligations of the Adams Express Company?

A. Not unless it was charged by them to the Adams Express Company.

[fol. 44] Q. In certain instances it paid obligations of the Adams Express Company and charged the amount to the Adams Express Company?

A. It did.

Q. Did it make any arrangements with the Adams Express Company to secure itself for the amount so paid out for account of the Adams Express Company?

A. Yes.

Q. Did it require a deposit of any money or securities in advance of making such payments?

A. It did.

Q. Did it require this deposit to be equal to or in excess of the amount of said payments? Did it demand that this deposit be equal to or in excess of the amount of said payments?

A. It was the practice for the American Railway Express Company to call upon the Adams Express Company for a cash contribution sufficient to meet any bills that would probably be assumed by them on this account.

Q. Can you explain what you mean by the term "Assumed"?

A. After the discontinuance of the Adams, there were many unsettled bills and items of other character which because of the fact that the records were not available to the then remaining organization of the Adams, we authorized the American to make payments for our account with the understanding that we would keep them in funds to make such payments.

Q. Do you know whether the Adams Express Company has ever authorized or requested the American Railway Express Company to pay for its account 59 judgments secured against the [fol. 45] Adams Express Company in the Harlan Circuit Court, Kentucky?

A. I know of no such authority.

Q. Do you know whether the Adams Express Company has ever delivered to the American Railway Express Company a sum of money for the purpose of paying the amount of these judgments?

A. I do not know of anything of that nature.

Q. To your knowledge has the American Railway Express Company any funds in its possession which are now due and owing to the Adams Express Company?

A. I may say about that they are supposed to have credits in their possession due Adams Express Company. How much would be actual cash, I don't know.

Q. Would those credits be due now—immediately due?

A. Not at the present time.

Q. Are any officers of the American Railway Express Company officers of the Adams Express Company?

A. Mr. Barrett, the President of the Adams and a couple of other members of Adams' Board are also members of the American Railway Express Company's board.

Q. Are any of the executive officers of the American Railway Express Company officers of the Adams Express Company?

A. No.

Q. Are any of the executive officers of the Adams Express Company in the employ of the American Railway Express Company?

A. No.

Q. Are any of the employes of the Adams Express Company in the employ of the American Railway Express Company?

A. Yes.

Q. Who?

[fol. 46] A. Mr. H. D. Freeman and Mr. Louis Coles are the only two I think.

Q. Has the Adams Express Company in your estimation still assets sufficient to meet its outstanding liabilities?

A. I believe it has.

Q. Has it any tangible property to your knowledge?

A. It has.

Q. Has it any real estate to your knowledge of which it is the owner?

A. Yes.

Q. At the time of the transfer of the operating property of the Adams Express Company to the American Railway Express Company on July 1, 1918, did it also transfer its money order business at the same time?

A. It did.

Q. To the American Railway Express Company?

A. The understanding was that the American Railway Express Company would act as its agent for the sale of its money orders. Subsequently the money order business was sold to the American Express Company.

Q. Not the American Railway Express Company?

A. Not the American Railway. And under the agreement of sale all the profits from the business beginning with July 1, 1918, belonged to the American Express Company.

Mr. Stewart:

Q. There is an express company different from the American Railway known as the American Express Company?

A. Yes.

Q. Did it on July 1, 1918, sell to the American Railway Express [fol. 47] Company its foreign business?

A. It did not.

Q. Is the Adams Express Company taking any action with reference to outstanding claims against it?

A. It is.

Q. Is it making payment of such claims directly from its own funds?

A. It is.

Cross-examination by Judge Forrester:

Q. Did the Adams Express Company on July 1, 1918, retain any property of any kind in Kentucky that it owned at that date?

A. It did not.

Q. Has it now any property of any kind in Kentucky?

A. It has none to my knowledge.

Q. This suit is to force the collection of judgments rendered by the Harlan Circuit Court, Harlan, Kentucky, against the Adams Express Company, amounting to $4,110.10, including costs. Has the Adams Express Company thought anything about paying these judgments or does it not intend to pay them unless it is forced to do so?

A. I don't know anything about it.

Q. The Commonwealth of Kentucky is trying to collect these judgments and has filed this suit in equity and made the American Railway Express Company a defendant for the reason that the Adams Express Company had conveyed or transferred all of its property in Kentucky to the American Railway Express Company. Now, on July 1, 1918, the Adams Express Company did own property in Kentucky before it transferred it to the American Railway Express Com-
[fol. 48] pany, did it not?

A. Prior to July 1st.

Q. About what value of property did the Adams own in Kentucky prior to July 1st, and up to that date—1918?

A. I have no knowledge or, rather, recollection.

Q. It did have a business in Kentucky and had property in Kentucky?

A. It did.

Q. What kind of property did it own in Kentucky?

A. Principally horses, wagons, equipments of various kinds, and I believe, some real estate.

Q. How was that real estate transferred—by deed or otherwise?

A. By deed.

Q. What did the Adams Express Company receive for this property in Kentucky which it transferred to the American Railway Express Company?

A. Shares of stock of the American Railway Express Company either received or to be received.

Q. Do you know whether or not any citizen of Kentucky was a stockholder in the Adams Express Company, or is now a stockholder of it?

A. I could not tell without records.

Q. Were the stockholders of the Adams Express numerous—many of them or only a few?

A. Approximately three thousand.

Q. You speak of the American Railway Express Company having credits due the Adams. About what amount, in your judgment are
[fol. 49] these credits? In other words, do they amount to more than this judgment sued for, $4,110?

Mr. Stockton: The defendants object to the question and any answer thereto because the witness did not state and has not stated that there were now due any credits by the American Railway Express Company to the Adams Express Company.

A. I cannot state, with my knowledge, what the status of the Adams Account is with the American Railway Express at this time.

Q. I understood you to state in answer to the question in chief there are some credits with the American in favor of the Adams. Am I right in that?

A. We have an account with the American of what they have expended for our account. Now whether that account shows a balance to us of anything tangible, I am not positive.

Q. Well, intangible? A credit would be intangible, would it not?

A. On the whole my duties don't bring me in contact with those items to that extent that I could answer positively on the subject now.

Q. As Treasurer of the Adams Express Company, do your records show the standing between the American Railway Express Company and the Adams Express Company and do they show the credits to which you referred in answer to the question in chief?

A. Not as Treasurer.

Q. Is the Adams Express Company in any kind of actual business now?

[fol. 50] A. No.

Q. For what purpose does it still retain its organization as a joint stock company?

A. It still has assets undisposed of and also obligations to be settled.

Q. It is retaining its organization for the purpose of winding up its affairs only, is that what I understand you to say?

A. That is all it has been doing up to this time. It has a bond issue that doesn't mature until 1948.

Q. Do you know what understanding either in writing or otherwise, there existed between the American Railway Express Company and the Adams Express Company, after July 1, or on July 1, 1918, for the payment of the outstanding obligations of the Adams Express Company at that date?

A. There was an understanding between them.

Q. If you know, state what that understanding was in that regard?

A. The understanding defined what the American Railway Express Company would undertake to do to settle outstanding obligations of the Adams Express Company solely for Adams Express Company's account without the assumption of any liability on the part of the American Railway Express Company, the Adams Express Company keeping the American Railway Express Company in funds sufficient to do so.

Q. And has that understanding been recognized at all times since July 1, 1918? In other words, has the Adams Express Company been making good to the American Railway Express Company all [fol. 51] the obligations that the American Railway Express Company have paid on account of existing obligations and liabilities of the Adams Express Company on July 1, 1918?

A. They have, to the best of my knowledge, made good to the American Railway Express Company; but the agreement referred to has since been cancelled in the respect that the American Railway Express Company for sometime past has made no payments for Adams's account.

Q. I learn from the deposition of Mr. Clark taken today that the Adams Express Company paid some cash consideration for stock of the American Railway Express Company. Do you know the amount of cash for the purchase of the stock of the American Railway Express Company paid by the Adams Express Company?

A. Nine hundred and some odd thousand dollars.

Q. Did the Adams Express Company ever receive from the American Railway Express Company any cash or property consideration

for any of its tangible property which the Adams Express turned over to the American Railway Express Company?

A. Not to my knowledge.

Q. The only thing that the Adams Express Company got from the American was stock?

A. That is all.

Q. State whether or not in your judgment the Adams Express Company in Kentucky owned and turned over to the American Railway Express Company tangible property of the value of over $5,000?

A. I believe so.

Q. Do you know whether or not any of the other express companies that transferred their property to the American Railway Express Company simultaneously with the transfer of the Adams Com-
[fol. 52] pany's property received anything from the American Railway Express for their property except stock?

A. I don't know of anything that the other companies received outside of stock.

Q. Did the American Railway Express Company to begin with, from its organization as a corporation on or about July 1, 1918, have any property of its own or any property or assets at all except what was turned over to it by the Adams Express Company and the other express companies, prior to July 1, 1918.

A. Not being in a position to know anything of the American Railway Express Company's affairs, I don't believe I could answer that.

Q. Who was the President of the Adams Express Company and who is the president of it?

A. William M. Barrett.

Q. What position does he hold with the American Railway Express Company?

A. He is a member of the Board of Directors of that Company.

Q. And what position do Mr. Freeman and Mr. Coles hold with the American Railway Express Company?

A. Mr. Freeman is General Auditor of the American Railway Express Company at Phildelphia. Mr. Coles—I think I will have to amend my first statement by saying that according to my information is now a retired or pensioned employe of the American Railway Express Company. Prior, I believe, to September 1st he had been an employe of that company.

[fol. 53] Q. What position did these two gentlemen hold with the Adams?

A. Mr. Freeman held the position of General Auditor of Adams Express Company. Mr. Coles as Auditor of the New England Division.

Q. State whether or not the employes of Adams Express Company who had charge of the various railroad stations in Kentucky and elsewhere at the time it transferred its property to the American Railway Express Company were changed or whether they were allowed to retain their positions as a local agent at the railroad stations where express was received and transmitted and collections made?

A. I have no knowledge of what appointments or transfers were made by the American Railway Express Company.

Redirect examination by Zeb A. Stewart:

Q. When you spoke of credits in your direct and your cross-examination, if I understand you correctly, these credits existed only when the Adams Express Company authorized or directed the American Railway Express Company to pay claims or obligations for it, and that upon such authority or authorization and direction by the Adams to the American that the American Railway Express Company in some instances paid such claims as were so authorized and charged same to the Adams express Company and the Adams Express Company thereafter paid these amounts to the American. Is this correct, and is that what you mean?

A. Not altogether, because the American had in its possession either cash or credits prior to the payment of Adams' liabilities. Now, the last statement I saw of what they call the liquidation account was for the month of June, I believe. What the status is of today I don't know.

[fol. 54] Q. The judgments sued on in this action are judgments which the Commonwealth of Kentucky secured against the Adams express Company for alleged violations by the Adams Express Company of the laws of Kentucky with respect to keeping records with reference to whiskey shipments. Now, I will ask you if the Adams Express Company has ever authorized or directed or if it is the intention of the Adams Express Company to authorize or direct the American Railway Express Company to pay off these judgments and charge same to the account of the Adams Express Company?

A. Not to my knowledge.

Q. Would such a procedure on the part of the American be in keeping with the line of credits that you have spoken of heretofore?

A. It would not.

Q. Who not?

A. The American Railway Express Company employes do certain work such as tracing etc., in connection with old Adams matters, for which the American Railway Express Company makes a charge against the Adams Express Company and the latter re-imburses the American for its so-called out-of-pocket expense.

Q. Is this plan of business which you have just explained what has caused these matters of credits between the two companies and for which they have charged the Adams and which the Adams has paid the American?

[fol. 55] A. Matters of that character. As I said before, there were many unadjusted matters at the time we discontinued business which we were not in a position to handle ourselves on account of our forces having been all taken over by the American Railway Express Company, with the exception of the comparatively few people who are left in the New York office.

Q. In the sale and transfer of the property of the Adams Express company in Kentucky to the American Railway Express Com-

pany in July, 1918, was there any fraud or lack of good faith in this transaction?

A. Not to my knowledge.

Q. Was this sale and transfer of this property in Kentucky by Adams Express Company made with the intention to defraud any creditors of the Adams Express Company?

A. I do not believe so.

Q. Approximately to the best of your judgment what is the value of the real and tangible property now owned by the Adams Express Company which it did not sell and transfer to the American Railway Express Company.

A. According to the recent compilation by accountants, the Company had property of value in round figures $2,700,000 in excess of liabilities which it did not sell or transfer to the American Railway Express Company.

Q. And does the Adams Express Company still own this property?

A. The Adams Express Company still owns that property.

Recross-examination:

Q. You speak of a statement which you saw in June of the Credits referred to, which you called the liquidation account. Was that June, 1919?

A. Yes.

[fol. 56] Q. Can you state approximately how the statement stood at that time between the Adams and the American Railway Express Company?

A. No. I can't recall without reference.

Q. In whose favor were the credits at that time?

A. I could not be positive even of that, as to whether it was in our favor or against us.

Q. Has the Adams Express Company on deposit in any bank or trust company or any institution in Kentucky any funds of any kind?

A. None to my knowledge.

Notary's certificate to testimony of Clark — omitted.

[fol. 57] HARLAN CIRCUIT COURT

[Title omitted]

AGREEMENT TO TAKE DEPOSITION ON INTERROGATORIES AND CROSS-INTERROGATORIES

It is agreed by and between the parties hereto, that the deposition of William M. Barrett be taken by Rita Ohlsen, a duly appointed and acting Notary Public, in and for county of Kings & New York State of New York, upon interrogatories and cross-interrogatories hereby submitted. It is further stipulated and agreed that the deposition so

taken by said Notary, shall be taken in the presence of the Notary alone, and that neither the plaintiff, nor the defendant be present in [fol. 58] person, or by attorney; that after the said witnesses is sworn, that the answer to each interrogatory and cross interrogatory shall be written by said Notary, and after completion of the writing of the answers that the witness shall sign said deposition; that said deposition shall be read on a trial of the above styled case on behalf of the defendants, subject to exceptions for incompetency and irrelevancies only.

Given under our hands this the 30th day of May, 1923.
J. S. Forester, Attorney for Plaintiff. J. B. Snyder, Stockton & Stockton, Attorneys for Defendants.

HARLAN CIRCUIT COURT

[Title omitted]

CROSS-INTERROGATORIES TO BE PROPOUNDED TO WILLIAM M. BARRETT, WITNESS FOR DEFENDANT

The deposition herein referred to is to be taken before some notary Public authorized to take depositions and in the absence of attorneys for plaintiff or defendants and so certified by the Notary Public.

1. What position did you hold with Adams Express Company and what position do you now hold with American Railway Express Company?

[fol. 59] 2. We now have on file this case the deposition of witnesses heretofore taken and among them is the deposition of Mr. Degnon, who was treasurer of Adams Express Company and from him we have it that written contract was made June 21st, 1918 by which Adams Express Company and six other express companies were to form the defendant American Railway Express Company, to meet the request of the Director General of Railroads, and that the tangible property and transportation business of these express companies were to be transferred to American Railway Express Company which last named company was to take charge of this property and business July 1st, 1918, and then carry on the same business which was being carried on to that date by these five express companies. Have you or can you procure a copy of that written contract and file it with and as part of your deposition? You are now requested to file a copy of this written contract. I understand that the United States was party to that contract and that it was reduced to writing in the form of a memorandum agreement and if your company intends to rely on any agreement made with the United States or the Director General of Railroads then the agreement or a duly attested copy is the best evidence of what the agree-

ment was and unless it is produced the plaintiff will move the trial court to exclude all evidence in regard to such agreement.

3. On July 1st, 1918, or before that time after June 21st, 1918, what disposition did the Adams Express Company make of its tangible property and transportation business which it had been carrying on up to that date?

[fol. 60] 4. What tangible property and what business did Adams Express Company retain transferring its property and business to the American Railway Express Company?

5. In a general way state what kind of property the Adams owned in Kentucky before it consolidated with the American Railway Express Company, or transferred its property to the American Ry. Ex. Co. and on what railroads did it do its Transportation business?

6. What property if any did it retain and not transfer in Kentucky?

7. Give us an estimate of the value of the property which the Adams owned in Kentucky and what it consisted of?

8. How much cash did the Adams transfer to the American Ry. Ex. Co.?

What was the total value of the property, business and cash which it transferred?

9. What did the Adams receive from the American Railway Express Company in return for the property, business and cash which it transferred and turned over to the American?

10. Was this stock of the American Railway Express Company turned over to the Adams through its officers, or was it delivered to its stockholders?

11. Who *was* the chief officers of the Adams at that time?

12. Who are the chief officers of the American Railway now and who were they when it was first organized?

13. Did the American Railway Express Company as a corporation have any money or property of its own when it took over the property of these other express companies, except the property which was transferred to it and the money which it received from these other express Companies including the Adams?

[fol. 61] 14. I am informed that you were president of Adams Express Company up until the time it transferred its property to the American Ry. Ex. Co., and for that reason you were then and are now in position to answer all of the questions relative to the coming together of the Adams and the other six express companies, whether you call this coming together a consolidation or a *pru*chase. After July 1st, 1918 or at any time did your company or not send out a circular letter to the public in the states where the Adams had been doing business to the effect that the American Ry. Ex. Co. would take care of and adjust the claims against the Adams that existed at the time the business was transferred? Will you file copy of that letter? Did you sign and circulate such letter yourself dated June 11th, 1918, as president of the Adams?

15. After this circular letter was issued did the American Ry. Ex. Co. adjust claims for the Adams Ex. Co. and if so how long did this arrangement continue?

16. Did the Director General of Railroads ever at any time to your knowledge, or did the United States Government ever during the war, or at all, assume any liability for the debts, or miscarriages or complaints against the American Railway Express Co.? or did the express company adjust its own differences with the public during the war?

17. The defendants have set out in their answer that the Director General would not permit the American Ry. Ex. Co. to assume any of the debts or liabilities of the constituent express companies. Did the Director General or any United States authority ever at any time execute any writing of any kind to the effect that the United States [fol. 62] Government would not allow the American Ry. Ex. Co. pay or settle existing claims against the other express companies; if you know of such writing will you produce and file a copy of it. If there was such writing, then how was it that the constituent express companies issued the circular letter in June 1918 to the effect that the American would settle such claims.

18. The memorandum agreement made by the seven express companies and the United States was to be good during the war only was it not? After the war and after the Armistice was declared did all of the seven express companies continue to allow their business to be carried on by the American Ry. Ex. Co. or did some one or more of them withdraw: Which of them withdrew from this arrangement?

19. Under the Transportation Act of Congress of 1920, it was provided that the Four Express Companies might be permitted to consolidate under one company, The American Railway Express Company. Do you know what Four companies were referred to in that act? What became of the interest of the other three companies that were in the agreement of June 1918 to unite under one name, The American Railway Express Company?

20. We all now know that the American Railway Express Company under the Transportation Act of Congress of 1920 filed a petition with the Interstate Commerce Commission requesting that the Adams Express Company, Wells Fargo & Co., and two others be permitted to consolidate under the name of said American Railway Express Company. Have you access to or can you get a copy of the petition thus filed with the interstate Commerce Commission? You are requested to procure and file a copy of this petition. I sup- [fol. 63] pose you are familiar with — that this petition was filed, or it may be called application, August 18th, 1920, and that on hearing the Interstate Commerce Commission granted permission to consolidate. Have you a copy of the order of the Commerce Commission made on this application or can you procure one and will you file it as part of your deposition?

21. If you are not inclined to procure or file the different writings which you have been requested to procure and file will you explain your reason for not doing so: If you still decline to procure and file these papers—writings is it not for the reason that you do not want them in the record because you know they are against the contention of the defendants?

22. How much money, if any, did the American Railway Ex. Co. pay out and charge in the accounts of the Adams Express Company for loss and damages claims against the Adams before July 1st. 1918, between the dates July 1st, 1918 and July 1st, 1920?

23. You have been asked various questions about the position taken by the Director General of Railroads and I will not know your answers until your depositions *is* mailed and filed as part of the record in this case at Harlan, Ky., if your answers are to the positions taken, then I desire to know whether or not these various positions were in writing and if in writing then I desire you to file a copy of the writings showing the positions taken about the matters set out in the questions. If they were not in writing then I desire to know how and where and from whom you received your infor-
[fol. 64] mation about the position of the Director General on any of these matters.

24. You have answered question 22 direct examination as to whether or not the Adams had any intention to defraud creditors by transferring its property in Kentucky to the American? This suit is brought in equity on a return of no property found on judgments rendered by the Harlan Circuit Court at Harlan, Ky., against Adams Express Company in favor of the Commonwealth of Ky. which judgments were rendered on suits pending in said court before July 1st, 1918. State whether or not the Adams Express Company could pay these judgments and costs if it wanted to do so: Has there been any time since these judgments were rendered that the Adams Express Company has not had means on hand with which to pay these judgments? If these judgments were transferred to New York City where it is said the Adams still has property and suit filed there to collect them, would the Adams resist the payment of the judgments there: Has the Adams, or have you as its president ever given any thought of your intention to pay these judgments? If you have then what is your intention: to pay or not to pay them?

25. If the Commonwealth of Ketnucky succeeds in collecting these judgments from the American Railway Express Co. then whose loss will it be, the loss of the Adams, or the loss of the American Railway Express Company? In other words is it the intention of the Adams to allow the American Railway Express Co. to pay its debt and not reimburse the American Ry. Ex. Co.?

[fol. 65] 26. I will be glad if you will explain why the Adams Express Company does not pay these judgments and thereby stop this suit against the American Railway Ex. Co.?

The plaintiff desires full and complete answers to all of its question-.

Harlan, Kentucky, April 30th, 1923.

The Commonwealth of Ky., Plff., by F. S. Forrester, Attorney.

[Title omitted]

INTERROGATORIES TO BE ADDRESSED TO WILLIAM M. BARRETT, A WITNESS ON BEHALF OF THE DEFENDANT AMERICAN RAILWAY EXPRESS COMPANY

1. Please state your name, and residence.
2. What is your present occupation?
3. How long have you occupied this position?
4. Please state fully what kind of a business organization the Adams Express Company is.

[fol. 66] 5. Is it now doing business in the state of Kentucky?

6. If your answer to the previous question is in the negative, please state when the Adams Express Company ceased to do business within the State of Kentucky.

7. Please state fully the circumstances in connection with the Adams Express Company's withdrawal from the State of Kentucky and transfer of its property within the State of Kentucky to the American Railway Express Company.

8. Was the Adams Express Company taken over by the Director General of Railroads in December 1917 at the same time that he took over the railroad lines?

9. Please state what, if any, part of the business of the Adams Express Company as conducted in 1917 and the spring of 1918 was played by the railroad companies?

10. State what if any circumstances prevented the Adams Express Company from continuing to do business in the State of Kentucky and other states in the United States, other than New York?

11. Please state fully the general nature of the contracts made with railroad companies by means of which the Adams Express Company did business within the State of Kentucky and generally throughout the United States prior to January 1, 1917.

12. When the United States first took possession of the railroad- in December, 1917, please state, if you know, what position the Director General of Railroads took with respect to existing contracts between the Adams Express Company and the railroad companies.

13. Please state, if you know, what position the Director General of Railroads took at that time with reference to making new contracts with the Adams Express Company.

14. Please state, if you know, what position the Director General of Railroads took with reference to the possibility of permitting the [fol. 67] Adams Express Company to operate on sufferance over the railroad lines necessary for it to do business in the state of Kentucky, and for what period.

15. Please state what alternatives confronted the Adams Express Company at the time of its negotiations with the Director General of Railroads in the spring of 1918 with reference to doing business over railroads necessary for the conduct of its operations within the State of Kentucky.

16. Was the formation of a single express to operate throughout the United States the suggestion of the Director General of Railroads or of the Adams Express Company?

17. What stand did the Director General of Railroads take with reference to permitting the Adams Express Company to operate as it previously had over railroads necessary for its business within the State of Kentucky and generally throughout the United States.

18. If the Adams Express Company had declined to transfer its operating property to a single company to be formed to make a contract with the Director General of Railroads, please state what alternative it would have been confronted with.

19. If the Adams Express Company had gone out of business in preference to transferring its operating property to the single company to be formed to do business with the Director General of Railroads please state what it would have been compelled to do with its operating property located in the State of Kentucky.

20. What was the general nature of this property?

21. If it had been compelled to go out of business in the spring of 1918 and had been compelled to sell its operating property within the state of Kentucky, what percentage of the book value of this operating property wa' it estimated would be obtained on such a sale?

[fol. 68] 22. Was there any intention on the part of the officials of the Adams Express Company in transferring the operating property of the company located within the State of Kentucky to the American Railway Express Company to defraud creditors of the Adams Express Company?

23. At the time the Adams Express Company transferred its operating property to the American Railway Express Company, please state what the approximate total assets of the Adams Express Company consisted of.

24. What proportion of these assets were transferred to the American Railway Express Company?

25. What was done with the assets which were not transferred to the American Railway Express Company?

26. What was done with the stock of the American Railway Express Company that was received in consideration of the transfer of the cash and operating property of the Adams Express Company?

27. Did the Adams Express Company pay for any property of the American Railway Express Company in cash and if so how much?

28. Has the Adams Express Company distributed any of its assets in liquidation of *tis* stockholders?

29. Is the Adams Express Company now engaged in any kind of business and if so where?

30. How many officers of the Adams Express Company are officers of the American Railway Express Company?

31. How many directors of the Adams Express Company are directors of the American Railway Express Company?

32. What is the total authorized number of directors of the American Railway Express Company?

[fol. 69] *32. What is the total authorized number of directors of the American Railway Express Company?*

33. Has the Adams Express Company any agreement, either *or* express or implied with the other stockholders of the American Rail-

way Express Company by which it controls any of the policies of the American Railway Express Company?

34. At the time of the tran-fer by the Adams Express Company to the American Railway Express Company of its tangible property used in the operation of an express business within the United States, please state whether or not the American Railway Express Company in any way expressly agreed to assume any of the liabilities of the Adams Express Company.

35. Did the American Railway Express Company undertake to perform any tasks for the Adams Express Company?

36. What was the method of operation that was to be employed in the performance of these tasks.

37. How long did this arrangement continue?

38. Under what circumstances did it stop?

39. Since February 1st, 1919, has the American Railway Express Company been authorized to adjust or settle any claims on behalf of the Adams Express Company?

40. Since February 1, 1919, has the American Railway Express Company been authorized to represent the Adams Express Company in any law suits brought against the Adams Express Company?

41. Did the American Railway Express Company ever pay out of its own funds any debts, obligations or claims of the Adams Express Company of any character whatsoever?

HARLAN CIRCUIT COURT OF KENTUCKY

[fol. 70] [Title omitted]

ANSWERS TO INTERROGATORIES PROPOUNDED TO WILLIAM M. BARRETT, A WITNESS ON BEHALF OF THE DEFENDANT AMERICAN RAILWAY EXPRESS COMPANY

1. William M. Barrett; age 64; residence 272 West 86th Street, New York City.

2. President Adams Express Company.

3. About fourteen years.

4. Adams Express Company was prior to July 1st, 1918, engaged in the express transportation business. Since its retirement from the transportation operations, it is practically a holding company.

5. No.

6. Midnight June 30, 1918.

7. The Adams Express Company, being unable to continue its domestic express business in Kentucky and elsewhere in the United States, ceased to do business at Midnight June 30, 1918, and sold its property and equipment used in any such business to the American Railway Express Company.

8. The Director General, being asked if the President's proclamation included the Adams Express Company advised it did not, and the express companies would not be taken over by the government.

[fol. 71] 9. The transportation furnished to the express companies by the railroads was an essential part of the business as conducted by the American Express Company and other organized companies in the United States.

10. The only business transacted by the Adams Express Company aside from its domestic transportation was its financial and money order business and its foreign express business. Without the facilities and transportation provided by the railroads the Adams Express Company could not continue to do business in Kentucky and other states of the United States, other than New York state, at any time; and the inability of the railroads, by reason of the refusal of the Director General to furnish these facilities, compelled the Adams Express Company to cease business as before stated.

11. The Adams Express Company in its domestic express business depended entirely upon the railroads to transport its business, and agreed under a contract for a term of years to pay such railroad companies for the transportation and facilities furnished which included the use of part of the railroad companies' stations and terminals, special cars, and frequent and special trains, transportation of the company's supplies and machinery, partial use of its telegraph and telephone lines and the joint employment of certain of the railroad companies's employes by the express companies. Without these facilities the express company could not do any business.

11. The Director General, being asked if he would be able to carry out the existing contracts between the Adams Express Company and the railroad companies, stated that he could not do so because it was necessary to unify the express companies as was done with the railroads.

[fol. 72] 12. The Director General refused to contract with the Adams Express Company or any other existing express company and would only do so with a new company to be formed to act as his sole agent.

13. The Director General continued to furnish facilities and transportation to the Adams Express Company in Kentucky and elsewhere, as well as to the other express companies, in the interval between December 28, 1917; but he advised the express companies that he would not continue to furnish any facilities whatever to the Adams Express Company or to any of the other then existing express companies after July 1st, 1918.

14. The Adams Express Company at that time had several thousand employes and a vast amount of property used in its operations scattered over probably 36 states of the Union, and located at various cities and towns in comparatively small quantities. Its operating expenses for the conduct of its business at that time were about $3,500,000 per month, and if its revenue were cut off because of inability to secure railroad transportation and facilities, its operating expenses, the pay of men, maintenance of offices, feed for horses, would have in a short time consummed the entire value of this property. It would be impossible for the Adams Express Company to secure for its property, if offered for sale in the various cities and towns in which located, any adequate price for it because such prop-

erty was specially fitted for the express business and worth little for anything else; and at any rate, was not subject to ready sale. The operating property of the express company was worth fully $8,500,000, but under the circumstances above stated, it would probably not [fol. 73] have brought one-half of that amount net. It was, therefore, necessary for the Adams Express Company to make such bargain as it could with the Director General who was in a position of absolute power over its destiny, and the contract entered into with the Director General for the sale of its property to the American Railway Express Company represented the best bargains the Adams Express Company was able to make.

15. The formation of a single express company was the result of an ultimatum of the Director General and was, in no way, the suggestion of the Adams Express Company.

16. The Director General, as previously stated, would not furnish any facilities to the Adams Express Company for its operation over railroads in Kentucky or generally throughout the United States after June 30, 1918.

17. If the Adams Express Company had declined to transfer its operating property under the requirements of the Director General it would have been confronted with the necessity of selling its entire property to the best advantage in the various places in which located and thrown out of employment thousands of trained and local employes who, under the plan adopted, were transferred to the service of the American Railway Express Company; and would have been further confronted with the charge of being unpatriotic and disloyal, in an endeavor to tie the hands of the government during a time of war and at a time when the transportation facilities were greatly needed and used to the utmost.

18. If the Adams Express Company had gone out of business in preference to transferring its property to the American Railway Express Company under the requirements of the Director General, it [fol. 74] would necessarily have been compelled to move its property to some central location and store it or dispose of it at various places where located to the best advantage.

19. From the character of the property it may be said that it would have been compelled to sell it where located and at a great sacrifice because the transportation facilities of the United States were greatly burdened by the necessary transportation of munitions and supplies for governmental purposes.

20. The property consisted principally of horses, wagons, trucks, safes, automobiles and office furniture and fixtures.

21. It is my opinion that less than 50% of the value of the property located in Kentucky and elsewhere would have been realized by a sale.

22. There was no intention on the part of the officials or officers of the Adams Express Company to defraud its creditors either by the transfer of its property to the American Railway Express Company or in any other way. Its physical property in Kentucky was sold because it could not continue to use it, being compelled to go out of

business, it therefore, had no further use for same. The Adams Express Company in settlements with its creditors voluntarily paid out millions of dollars in Kentucky and other states of the Union to claimants and others long after its physical property had been transferred.

23. Approximate total assets of the Adams Express Company at time of transfer was $63,533,472.19.

24. $8,600,000.

25. The assets retained by the Adams Express Company were its money order and financial business which was sold approximately one year after the sale of its physical property in Kentucky. Its foreign freight business was continued for a short time, but without [fol. 75] the domestic business, it was found unprofitable, and its foreign property was sold.

26. A part of its was transferred to the United States Railroad Administration in final settlement with the government. This stock was subsequently repurchased from the government by the Adams Express Company and all of the stock originally issued to the Adams Express Company by the American Railway Express Company is now in Adams treasury.

27. $906,300.

28. No.

29. Engaged in business in New York City and vicinity in transporting money and valuables in armored cars manned by armed guards.

30. None.

31. Three.

32. Twelve.

33. It has not.

34. The American Railway Express Company did not agree to assume any of the liabilities of the Adams Express Company nor has it ever assumed any of the liabilities of the Adams Express Company.

35. Yes.

The contract with the Director General provided that the Adams Express Company and the other express companies should have the right to employ the new company as their agent to close out all unfinished express transportation business transacted prior to July 1st, 1918, and upon such reimbursement of said new corporation of any out-of-pocket costs as may be agreed upon between the parties, subject to the approval of the Director General. Under this provision [fol. 76] the Adams Express Company employed the American Railway Express Company to collect for it outstanding debts due the Adams Express Company and remit the money to the Adams Express Company and to collect from its various local agents (approximately 6,000) any balances due on its account and remit the money to the Adams Express Company; to deliver for its account any undelivered shipments remaining on hand at its various offices; to verify its records in case of claims and transfers in order to determine if any such shipments had been delivered; and it also authorized the American Railway Express Company from time to time to pay cer-

tain amounts due to creditors of the Adams Express Company from funds provided by the Adams Express Company. It also authorized the American Railway Express Company to sell for the account of the Adams Express Company at various points on hand matter accumulated which was unclaimed and which under the law we had the right *of* dispose of for charges.

36. The local agents and the officers of the American Railway Express Company were to do these tasks for the account of the Adams Express Company, and the Adams Express Company was to reimburse the American Railway Express Company for any out-of-pocket costs for which it was put for the service.

37. This arrangement by which the Adams Express Company authorized the American Railway Express Company to pay certain claims for its account out of funds provided to it was discontinued by the Adams Express Company February 1st, 1919, who undertook, after said date, to pay such claims by check from New York.

39. Since February 1st, 1919, the American Railway Express Company has not been authorized to adjust or settle any claims on account of the Adams Express Company.

40. Since February 1st, 1919, the American Railway Express [fol. 77] Company never paid out any of its own funds any debts, claims or obligations of the Adams Express Company of any character whatever.

Answers to Cross-interrogatories Propounded to William M. Barrett, Witness for Defendant

1. I have been the President of the Adams Express Company as well as a manager and trustee of that company for several years and I still am President of the Adams Express Company and one of its managers and trustees. The only relation that I have with the American Railway Express Company is that I am one of its 12 directors and have been since 1918.

2. I know of no written contract by which the Adams Express Company and six other express companies were to form the defendant American Railway Express Company such as you state was testified to by Mr. Degnon. I do know of a contract between the Director General of Railroads and the Adams Express Company, American Express Company, Southern Express Company and Wells Fargo & Company of date June 21, 1918, a copy of which contract I have attached marked "Barrett Exhibit I."

3. The Adams Express Company sold its physical property used in the operation of its express business in the United States to the American Railway Express Company at a valuation arrived at by taking the cost of such physical property and deducting therefrom the accrued depreciation. The Adams Express Company abandoned its transportation business at midnight of June 30, 1918, not being in a position to continue it.

4. The Adams Express Company retained tangible property in the shape of bonds, stocks, mortgages, and other securities, real estate in

several states and its office equipment and furniture at its home office [fol. 78] at New York, in addition to its property in countries used in conducting its foreign business. The Adams Express Company retained its money order and financial business, and its foreign freight and financial business after it sold its physical property to the American Railway Express Company.

5. The Property owned by the Adams Express Company in Kentucky before it sold the same to the American Railway Express Company consisted largely of horses, wagons, trucks, automobiles and office furniture at its various offices throughout the state of Kentucky, as well as office and depot fixtures; Louisville and Nashville; Chesapeake & Ohio, Louisville, Henderson & St. Louis, Pennsylvania Lines west of Pittsburgh, Brooksville, Frankfort & Cincinnati, Carrollton & Northville.

6. The Adams Express Company did not retain any property in Kentucky.

7. The estimate of the value of the property of the Adams Express Company in Kentucky was $92,167.36 and consisted principally of horses, wagons, trucks, automobiles, office fixtures, etc.

8. The Adams Express Company paid to the American Railway Express Company in cash $906,300. Upon its stock subscription. The total value of the property sold to the American Railway Express Company by the Adams Express Company and the amount of cash paid upon its stock subscription was $8,600,220.89. It is impossible for me to estimate the value of the business which the Adams Express Company was compelled to abandon and which it did not sell to the American Railway Express Company or to any [fol. 79] one else. It was a business built up during 60 or 70 years of good express service of which the good will with the established organizations should have been valued at several millions of dollars but for which the Adams Express Company never received one cent and which was totally destroyed by its forced retirement from business.

9. The Adams Express Company received from the American Railway Express Company 86,000 shares of stock in exchange of the property and cash which it turned over and transferred to the American Railway Express Company. It received nothing for its business or organization.

10. The stock of the American Railway Express Company was delivered to the Adams Express Company and placed in the custody of the Adams Express Company's Trustees. It was not delivered to its stockholders and has not been up *ot* this time.

11. The chief officers of the Adams Express Company at that time, i. e., June 30, 1918, were W. M. Barrett, President, T. J. Degnen, Treasurer, and H. H. Gates, secretary.

12. The chief officers of the American Railway Express Company now are George C. Taylor, President, C. A. Stedman, R. E. M. Cowie, A. Christesen, C. D. Summy and W. G. Smith, Vice-Presidents and F. S. Holbrook, Treasurer. The chief officers of the American Railway Express Company when it was first organized

were the same, except that C. S. Spencer was Treasurer in place of F. S. Holbrook and E. M. Williams was Vice-President in place of W. G. Smith.

[fol. 80] 13. No.

14. You are correctly informed that I was president of the Adams Express Company up to the time it sold its property to the American Railway Express Compa I was then and am now in a position to answer any questions relative to the entire transaction. Neither after July 1st, 1918, or at any time did the *the* Adams Express Company send out a circular letter to the public in the states where the Adams was doing business to the effect that the American Railway Express Company would take care of and adjust claims against the Adams that existed at the time the business was transferred. In conjunction with other express companies, I did address a circular letter to officers, agents and employes on June 11, 1918, advising them that the handling of claims against the express companies would be undertaken by the new company. This letter was not addressed to the public nor circulated, but was addressed to "Officers, Agents, and Employes", and was intended to place officers and agents in a position to explain to claimants who might be apprehensive that the Adams Express Company had made arrangements whereby, through funds furnished by it, any just claims against it might be paid by the American Railway Express Company.

15. After July 1st as already testified, the American Railway Express Company did settle certain claims for the Adams Express Company, in every case paying the same out of the funds provided by the Adams in advance, and this arrangement continued up until February 1st, 1919, after which time any authority for any such adjustment was withdrawn by the Adams Express Company and thereafter the Adams Express Company paid its own [fol. 81] claims by check from New York.

16. Neither the Director General of Railroads nor the United States Government during the war or at any other time assumed any liabilities for the debts or miscarriages or complaints against the American Railway Express Company so far as I know, and that company adjusted its own differences with the public during the war and since that time, so far as I know.

The Government took possession and assumed control of the American Railway Express Company on November 21, 1918, and maintained such possession and control up to March 1st, 1921. During that period, the Government and the Director General, while conducting the business of the American Railway Express Company, would be responsible for any debts, liabilities or complaints against the service operated in the name of American Railway Express Company by the Government. The Government did not, however, either guarantee or pay the American Railway Express Company in return for the use of its property as it did in the case of the Railroads.

17. While no writing of any kind to my knowledge specifically

provided that the American Railway Express Company should not pay and settle existing claims against the other express companies, the agreement between the Director General and the several express companies by necessary implication provides to that effect, since that contract provides specifically that the Adams Express Company and other Express companies may employ the American Railway Express Company to close out all unfinished express transporta-
[fol. 82] tion business.

18. I know of no agreement between seven express companies and the United States. The copy of the agreement attached as Barrett Exhibit I is the only agreement between the government and the express companies of which I am aware. The American Railway Express Company still continues to handle all the express business of the United States and it has done so since its organization, except the Southern Railway, the Mobile and Ohio and a few minor lines. It would have been impossible for any of the express companies to have re-entered business at the close of the war for reason that their organizations were entirely broken up and all of their contracts with the railroads had come to an end, and all their property had been merged into a common whole and could not again be sorted out even had the experience of the injury done to the express company during the war justified them in re-entering the field. None of the express companies signing the agreement with the government has endeavored to rescind the sale or take back its property, nor has the American Railway Express Company tendered the property back to any of the companies. I can not undertake to construe the transportation act of 1920. I presume the four companies referred to in that act were the Adams, American and Southern Express Companies and Wells Fargo & Company.

19. If your question refers to the interests of the American, Wells Fargo & Southern that were in the agreement of June, 1918, I will answer that so far as I know these companies retained all of the interest they had in the American Railway Express Company, but that all of them retained their separate entity as corporations and did not unite under one name as the American Rail-
[fol. 83] way Express Company, nor has the Adams Express Company.

20. I understand that the American Railway Express Company filed a petition with the Interstate Commerce Commission, requesting that commission to approve a consolidation of the domestic express business. I have not a copy of the petition filed with the Interstate Commerce Commission by the American Railway Express Company under the transportation act of 1920, nor have I a copy of the order of theInterstate Commerce Commission made on this application. I do not care to undertake to procure one, since it is just as easy for you to secure one from the Interstate Commerce Commission as it is for me, and I do not regard it as having any connection with the matter in hand.

21. I have not procured and filed the above mentioned application or decision of the Interstate Commerce Commission because I do not

believe you have the right to ask me to do so, and I still decline to procure and file these writings for the reason that I do not believe they have anything to do with the matter in hand and for the further reason that you can as easily secure them as I can.

22. The American Railway Express Company paid out more than $1,000,000 for loss and damage claims of the Adams Express Company out of funds provided by the Adams Express Company in advance, between July 1st, 1918, and February 1st, 1919.

23. My answers with respect to the position of the Director General of Railroads have been in some cases with respect to his positions which were not in writing and some in which they were in writing. [fol. 84] I have already attached "Barrett Exhibit I", a copy of the contract between the Director General and the Adams Express Company and other express companies which summarizes briefly the position taken by the Director General, and as a direct answer. I call your attention to the preamble of said contract in which the following appears (Lines 28 to 33 inclusive):

"Whereas the Director General has determined that in the public interest and in view of the necessities of the Government in time of war, he should take over and conduct the express transportation service upon the railroads and systems of transportation under Federal control, and has, therefore, found it inexpedient to carry out and perform the individual contracts of such railroad companies with the several express companies aforesaid;"

and on page 2, lines 1 to 4:

"Whereas the Director General is of the opinion that the express transportation business upon the railroads and systems of transportation under Federal control can be most efficiently carried on through the agency of a single corporation, which shall act as the sole agent of the Government in conducting said business."

My information prior to the signing of the contract was received from Mr. McAdoo and the various members of his staff among them Mr. Walker D. Hines, Edward Chambers, Charles A. Prouty and John Barton Payne.

24. The Adams Express Company could pay the judgments and costs if it wanted to do so. There has never been any time since the judgments were granted that the Adams Express Company has not had the means on hand with which to pay the judgments. If the judgments were transferred to New York City where the Adams [fol. 85] has property and sued upon there to collect them the Adams would resist the payment of the judgments there and neither the Adams nor myself as President *was* ever had any intention of paying these judgments if it could avoid it. We regard these judgments as an iniquitous attempt on the part of the officers of the State of Kentucky to unjustly collect from the Adams Express Company for their personal benefit penalties for so-called infractions of law which were in no sense, wilful and which were in effect trumped-up charged

of purely technical violations of law requiring the express company to keep a record of liquor shipments by express. The agents of the Adams Express Company substantially complied with the spirit of the law, and the infractions for which penalties were assessed were merely constructive violations of the letter of the law, comparable to failure to dot an "i" or cross a "t". We do not believe under a fair administration of law and justice that the Adams Express Company could or should be held liable for any part of the penalties or costs for which these suits were brought.

25. If the Commonwealth of Kentucky suceeds in collecting these judgments from the American Railway Express Company, I am unable to state whose loss it will be. It may be the loss of the United States Goverment, or the loss of the American Railway Express Company. The Adams Express Company will not pay these judgments unless compelled to do so.

26. I have already answered as to why the Adams Express Company does not pay these judgments.

William M. Barrett.

[fol. 86] Notary's certificate omitted.

(Exhibit I filed with the deposition of William M. Barrett, is as follows, to-wit:

[fol. 87] BARRETT EXHIBIT I

Memorandum of Agreement Between the United States and the Express Companies

This agreement, made this 21st day of June, 1918, between William G. McAdoo, Director General of Railroads hereinafter called the Director General, acting on behalf of the United States and the President, under the powers conferred on him by proclamations of the President hereinafter referred to, and the Adams Express Company, American Express Company, Southern Express Company, and Wells, Fargo & Company, hereinafter referred to as the Express Companies,

Witnesseth:

Whereas the President of the United States, on December 28, 1917, acting under the powers conferred on him by the Constitution and laws of the United States, including those conferred by Section 1 of the Act of Congress entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916, took possession and assumed control of certain railroads and systems of transportation, and has since operated and controlled the same, and

Whereas, by a proclamation dated March 29, 1918, the President of the United States authorized William G. McAdoo, as Director General of Railroads to make any and all contracts or agreements which in any way may be found necessary or expedient in connec-

tion with the Federal control of systems of transportation, as fully in all respects as the President is authorized to do; and

[fol. 88] Whereas said railroads and systems of transportation, taken over as aforesaid, include various railroads theretofore operated by companies which had, by written contracts, agreed to furnish to the individual express companies aforesaid certain privileges, facilities, and transportation for the carrying on of the express transportation business of said express companies in the United States; and

Whereas said railroad companies are now unable, and will hereafter be unable, except through the Director General, to perform said contracts so long as the railroad properties formerly operated by them, respectively, remain under Federal control; and

Whereas the Director General has determined that in the public interest and in view of the necessities of the Government in time of war, he should take over and conduct the express transportation service upon the railroads and systems of transportation under Federal control, and has, therefore, found it inexpedient to carry out and perform the individual contracts of such railroad companies with the several express companies aforesaid; and

Whereas the Director General desires to secure the continuance of the trained force*d* of said Express Companies, so far as may be necessary, in said proposed express transportation business, to the end that the same may be conducted with the greatest possible efficiency; and

Whereas said Express Companies are willing to aid in placing at the service of the Director General their operating property and trained forces upon reasonable terms; and

Whereas the Director General is of the opinion that the express transportation business upon the railroads and systems of transporta-

[fol. 89] tion under Federal control can be most efficiently carried on through the agency of a single corporation, which shall act as the sole agent of the Government in conducting said business:

Now, therefore, in consideration of the promises and of the covenants herein contained the said parties have made the following agreement:

First. That the Express Companies, as soon as may be after the date hereof, shall cause to be organized a corporation for the purpose of carrying on for the Director General the express transportation business upon the railroads and systems of transportation under Federal control, and elsewhere as may be determined by the Director General, in connection with the express transportation business thereupon. Said corporation shall have a capital stock not exceeding forty million dollars ($40,000,000), and the shares shall be subscribed and purchased at par by all the Express Companies before named.

Second. The Express Companies shall sell, convey, set over, and tran-fer to the said new corporation all property owned and used by

them, respectively, in carrying on their express transportation business in the United States including supplies and materials on hand in the supply departments and at the various offices of said companies, but not including cash or treasury assets, the aggregate value of which property is estimated to be, as of November 30, 1917, Thirty Million ($30,000,000) Dollars.

If during the period intervening between said date, November 30, 1917, and the taking over of the property of the said respective companies on July 1, 1918, any property or equipment shall have been purchased by any of the said Express Companies for use in their domestic express transportation business, said property shall [fol. 90] be turned over to the said new corporation at cost less accrued depreciation. It is understood that said Express Companies are to transfer to the said new corporation as aforesaid all of their property aforesaid used and usable in the conduct of the express transportation business to be carried on as provided in this contract: Provided, however, That the said property to be turned over to the said new corporation of the value stated above does not include the office building of the American Express Company at 65 Broadway, New York, the office building of the American Express Company at 23–29 West Monroe Street, Chicago, or the office building of the Wells, Fargo Company on Sixth Street at Portland, Oregon.

The new corporation shall be furnished cash by the Express Companies in a sufficient amount to constitute reasonable working capital. No shares of capital stock shall be issued except on payment therefor at par in cash, or its equivalent in property at the fair market value thereof. No evidence of indebtedness except ordinary bank or commercial loans for current purposes shall be made or issued by the new corporation without the prior approval in writing of the Director General; nor shall any lein of any kind be placed by it upon any property of the new corporation without the prior approval in writing of the Director General. All loans shall be reported to the Director General as soon as made.

Third. Within the limit herein fixed the stock issued by said new corporation shall be sufficient to pay at par for the property so transferred to it and to provide the cash necessary for working capital. The initial issue of the stock of said new corporation shall not be made until such issue shall have been approved in writing [fol. 91] by the Director General. From time to time thereafter as additional funds may be necessary to purchase additional property or reimburse the company for additional property purchased or for working capital, additional stock may be issued by said new corporation, but no issue shall be made without the approval in writing of the Director General.

Fourth. The Express Companies further agree that they will without additional compensation assign, transfer, and turn over to the said new corporation as of July 1, 1918, any and all leases, contracts, or agreements relating to their express transportation business in the United States, except contracts for express privileges

with railroads or systems of transportation now under Federal control.

As a condition of this agreement the Director General requires and the Express Companies consent that the several contracts of the Express Companies with the railroads and systems of transportation taken over by the Government under the President's proclamation of December 26, 1917, shall be canceled and annulled from and after July 1, 1918, and the parties hereby agree to take all necessary and proper steps in due time to bring about such cancellation and annulment of such contracts, which cancellation and annulment shall not affect rights at that time accrued and unsatisfied.

The Express Companies shall assign as far as possible all contracts with any rail, water, or electric lines not taken over by the Government to said new corporation and shall not engage in the express transportation business in the United States during the period of contract between the Director General and said new corporation, except [fol. 92] upon the approval of the Director General or when necessary to carry out a contract with a line not taken over by the Government and which they are unable to assign or cancel.

The said Express Companies severally agree that they will make no claim for damages against the Government or any railroad company on account of the cancellation of any contract with any railroad or system of transportation taken under Federal control.

Fifth. Said Express Companies also agree that they will assent to, and so far as they can promote the employment by said new corporation of such of their officers, agents, and employees as may be necessary to the carrying on by it of said express transportation business aforesaid.

Sixth. The Director General agrees that upon the organization of the said new corporation he will enter into a contract with said new corporation upon the terms and conditions set forth in Exhibit "A" attached hereto and made a part hereof.

Seventh. The said Express Companies may employ the said new corporation during the period of said contract as agent of said Express Companies in their foreign business and for the handling of money orders and other financial paper and for such other purposes as may be desired, unless in the judgment of the Director General the express transportation business conducted by said new corporation will be prejudiced thereby. Said Express Companies shall pay to said new corporation such compensation for its services as shall be agreed upon between the parties from time to time as fair and reasonable, which compensation shall be considered as a part of the gross contract income of said new corporation. The Director General, however, may require said contracts to be submitted to him for his approval, and no contract disapproved by him shall thereafter be effective between the parties.

[fol. 93] Eighth. The Express Companies shall have the right to employ the new corporation as their agent to close out all unfinished express transportation business of such Express Companies

transacted prior to July 1, 1918, upon such reimbursement of said new corporation of any out-of-pocket cost, as may be agreed upon between the parties subject to the approval of the Director General, and the new corporation shall until March 31, 1919, take charge of and from time to time, as requested by said Express Companies, deliver to them at such points as may be designated by the Express Companies such of their books, records, and papers as may not be necessary for the business of the new corporation.

Ninth. It is the intention that the provision herein made for carrying on the express transportation through the agency of a single corporation shall continue in effect only during the period of Federal control, and nothing herein contained shall be construed as sanctioning any combination or merger of the properties or business of the Express Companies to last beyond that period.

Wherefore it is agreed that the Express Companies shall maintain their independent corporate existence, and that upon the termination of Federal control the property herein agreed to be conveyed by each of them to the new corporation (or the equivalent of such property) shall be reconveyed to it by the new corporation (back to them) at a valuation to be agreed upon or in the event of disagreement to be fixed by the Interstate Commerce Commission.

[fol. 94] Tenth. Any controversy which may arise as to the performance of any part of this contract shall be submitted to and determined by the Interstate Commerce Commission and its decision thereon shall be final.

Eleventh. The words "Director General" as used herein shall be taken to apply to any official or person who may now exercise the authority of the United States with respect to said lines of railroad under Federal control, or may hereafter, as the successor of the Director General exercise such authority.

The word "railroad" as used herein shall include all systems of transportation and appurtenances thereto under Federal control covered by this contract.

The words "capital stock" or "outstanding capital stock" as used herein shall mean and include only stock issued by the new corporation upon the approval of the Director General and not canceled.

Execution

In witness whereof these presents in quintuplicate originals have on the day and year first above written, been duly signed and delivered by William G. McAdoo, Director General of Railroads, and duly signed, sealed, and delivered by the Adams Express Company, by William M. Barrett, its president, thereto duly authorized by a vote of the directors of the company at a meeting duly called and held on June 20th, 1918; by the American Express Company, by George C. Taylor, its president, thereto duly authorized by a vote of the directors of the Company at a meeting duly called and held on

[fol. 95] June 20th, 1918; by the Southern *Southern* Express Company, by Thomas W. Leary, its president, thereto duly authorized by a vote of the directors of the Company, at a meeting duly called and held on June 20th, 1918; by Wells Fargo & Company, by Burns D. Caldwell, its president, thereto duly authorized by a vote of the Directors of the Company at a meeting duly called and held on June 21st, 1918, certificates of which, duly attested by the companies' secretaries, are hereto attached.

W. G. McAdoo, Director General of Railroads, by Walker D. Hines, Assistant Director General. The Adams Express Company, by William M. Barrett, Its President. Attest: Horatio H. Gates, Secretary. (Company's Seal.) American Express Company, by George C. Taylor, Its President. Attest: F. P. Small, Secretary. (Company's Seal.) The American Express Company has no seal. F. P. Small. Southern Express Company, by Thomas W. Leary, Its President. Attest: Horatio H. Gates, Secretary. (Company's Seal.) Wells, Fargo & Company, by Burns D. Caldwell, Its President. Attest: C. H. Gardiner, Secretary. (Company's Seal.)

[fol. 96] Certificates of Approval by Boards of Directors of the Express Companies

At a meeting of the Board of Managers of the Adams Express Company held at the office of the company at 61 Broadway, in the city of New York, on the 20th day of June, 1918, on motion duly made, seconded, and carried, it was

Resolved, That the Attached draft of proposed contract between the Director General of Railroads and the Adams Express Company, American Express Company, Southern Express Company, and Wells Fargo & Company, relating to the operation, compensation, and other matters connected with the express transportation business over the transportation systems under Federal control, be approved, and the President and Secretary be instructed to execute the same.

William M. Barrett. Attest: Horatio H. Gates, Secretary.

At a meeting of the Board of Directors of the American Express Company held at the office of the company at 65 Broadway, in the city of New York, on the 20th day of June, 1918, on motion duly made, seconded, and carried, it was

Resolved, That the attached draft of proposed contract between the Director General of Railroads and the Adams Express Company, American Express Company, Southern Express Company, and Wells, Fargo & Company relating to the operation, compensation, and other matters connected with the express transportation business [fol. 97] over the transportation systems under Federal control, be approved, and the President and Secretary be instructed to execute the same.

George C. Taylor. Attest: F. P. Small, Secretary.

At a meeting of the Board of Directors of the Southern Express Company held at the office of the company at 61 Broadway, in the city of New York, on the 20th day of June, 1918, on motion duly made, seconded, and carried, it was

Resolved, that the attached draft of proposed contract between the Director General of Railroads and the Adams Express Company, American Express Company, Southern Express Company, and Wells Fargo & Company, relating to the operation, compensation and other matters connected with the express transportation business over the transportation systems under Federal control, be approved, and the President and Secretary be instructed to execute the same.

Thomas W. Leary. Attest: Horatio H. Gates, Secretary.

At a meeting of the Board of Directors of Wells, Fargo & Company held at the office of the company at 51 Broadway, in the city of New York, on the 21st day of June 1918, on motion duly made, seconded, and carried, it was

Resolved, that the attached draft of proposed contract between the Director General of Railroads and the Adams Express Company, Southern Express Company, and Wells, Fargo & Company, relating to the operation, compensation, and other matters connected with the express transportation business over the transportation systems under Federal control, be approved, and the President and Secretary be instructed to execute the same.

[fol. 98] Burns D. Caldwell. Attest: C. H. Gardiner, Secretary.

Exhibit A in Evidence

This agreement, made this 26th day of June, 1918, between William G. McAdoo, Director General of Railroads, hereinafter called the Director General, acting on behalf of the United States and the President, under the powers conferred on him by proclamations of the President dated December 26, 1917, and March 29, 1918 and the American Railway Express Company, hereinafter referred to as the Express Company,

Witnesseth:

That for and in consideration of the mutual covenants, separate services, and payments hereinafter recited to be by the parties kept, performed, and made, the parties do hereby agree as follows:

I

That in the interest of greater efficiency in express service and effecting economies in operating expenses of both the railroads under Federal control and the Express Company the Director General hereby employs the Express Company as the sole agent of the Government under the supervision of the Director General of Railroads to conduct the Express transportation business upon all lines

of railroad under Federal control and upon such other systems of transportation or parts thereof as in the judgment of the Director General it may be necessary or desirable to include.

II

This contract shall take effect on July 1, 1918, and shall continue during the full period of Federal control as that period is limited by section 14 of "An Act to Provide for the Operation of Transporation Systems while under Federal Control, for the Just Compensation of Their Owners, and for Other Purposes," approved [fol. 99] March 21, 1918.

III

The express transportation business to be carried on under this contract is understood to mean such transportation business as is commonly carried on by express companies at the present time, or as may be carried on by them during the continuance of this contract, and for the purpose of this contract it is agreed that the express business contemplated by this contract shall include all matter carried on passenger, express, or mail trains of the railroads, except baggage of passengers and theatrical scenery and belongings when checked on regular transportation, United States and railroad mail including parcel-post matter, corpses when accompanied by some one in charge, news trunks and property necessary to carry on the usual news business, goods material for the use of railroads and supplies for railroad eating houses and dining cars. The Director General as well as the Express company shall have the right to carry on such trains freight from the Orient imported by Coast ports, newspapers, milk, and cream and returned empties: Provided, however, that nothing in this agreement shall prevent the Director General from transporting horses, carriages, or cattle or other classes of freight upon passenger trains when necessary in emergencies to avoid delay to freight shipments; and provided further, that no explosives, inflammable articles, or acids shall be considered express traffic except such as it may be lawful to transport on passenger trains when properly packed, marked, and certified to as required by the regulations of the Interstate Commerce Commission or other public authority for the transportation of explosives, by the rules of the American Railway Association, and such regulations for the transportation of inflammable articles and acids as may be fixed by the Director General. The maximum weight to be carried in [fol. 100] any of the cars carrying express business shall not exceed a limit which in the judgment of the Director General is necessary for safety. Articles which can only be loaded and unloaded through end doors of express or baggage cars causing delays to passenger trains in switching for this purpose shall not be accepted by the Express Company unless a special car is furnished and charged for at the carload rate, and the Express Company shall not accept shipments which cannot be so handled as to avoid unusual delays to the trains of the Government.

Said express transportation business shall be conducted under such rates, charges, classifications, regulations, and practices as are now or may hereafter be lawfully established. The Director General shall take all steps lawfully necessary to make any change in such rates, charges, classifications, regulations, and practices. The Express Company shall propose no reduction in rates or charges without the prior approval of such reduction by the Director General. The Express Company shall solicit no express shipments disapproved by the Director General.

IV

The Director General shall furnish adequate and suitable space in cars properly equipped, heated, lighted, and lettered American Railway Express Company of the kind customarily furnished by railroad companies for the use of express companies on such passenger, mail, and express trains as may be designated from time to time by such passenger, mail, and express trains as may be designated from time to time by the Director General over each of the lines of railroad covered by this contract for the transportation and proper handling en route of all express matter tendered by the Express Company at any station at which said trains make regular stops and shall carry such express matter and the safes, packing, trunks, supplies, and equipment of the Express Company, together with the messengers, helpers, and guards of the Express Company necessary for the handling and protection of such express matter to destination or the proper transfer points on said railroads. The [fol. 101] Director General shall, so far as it can conveniently be done without interferring with his business, permit the Express Company to use a portion of station buildings on the lines covered by this agreement without charge therefor for the reception, loading and unloading, safe-keeping, and delivery of express matter carried under this agreement. Where special services or facilities have been furnished upon payments by the express companies in addition to the percentage of gross earnings both parties hereto shall have the benefit of such arrangements until otherwise determined by the Director General or by the Express Company after notice and hearing. The movement of express shall be under the control of the Dirctor General at all times and transported over such lines of railroad and on such trains as he may direct in the interest of economy in car service by utilizing available space and with proper regard for the necessity of prompt movement.

V

Said Express Company shall use its teams, property, offices, and other facilities, and its agents and employees in operating an express transportation business on all the lines of railroad under Federal control, and upon such other systems of transportation, or parts thereof, as in the judgment of the Director General it may be necessary or desirable to include; and in the conduct of said business

will exert itself in all proper ways to make said business satisfactory to the public and to the Director General. All contracts between the Express Company and railroads and systems of transportation not under Federal control shall be subject to the approval of the Director General.

VI

The Express Company shall be liable for all loss or damage to the facilities furnished by the Director General to the Express Company for use in the express transportation business caused by the Express Company, its agents, or employees.

[fol. 102] As between the Director General and the Express Company the Express Company shall be liable for any and all claims on account of loss, damage, or delay to its own property or the property of others in its charge carried under the provisions of this contract, and it shall assume all risk of injury or death to its agents or employees while engaged in its business on any of the lines or premises covered by this contract; and shall indemnify and save harmless the Director General, or any agent or employee of the Director General, including any railroad company engaged in the operation of any railroad under Federal control covered by this contract, and the employees of any such company, against all claims, damage suits and actions whatsoever that may be begun against any of the same on account of any claim arising or growing out of the undertaking so above assume- whether in law or in equity or before any compensation board, tribunal, or court whatsoever; and any amounts paid hereunder shall be charged to operating expenses.

VII

In any action at law or in equity or other proceeding brought against said Express Company before any compensation board, court, or other tribunal it will make no defense, except with the approval of the Director General; upon the ground that it is by virtue of this contract an instrumentality or agency of the Federal Government; nor will it seek to transfer to a Federal Court any such action brought against it in any state court upon the like ground except with the approval of the Director General. Any and all other legal rights of the Express Company except as above limited are expressly reserved.

VIII

From the gross revenue earned on the transportation by the Express Company of all the express traffic on all lines under Federal control covered by this contract, under such rates, charges, and [fol. 103] classifications as shall be in force, it shall pay to the Director General — per cent.

To the balance of the revenues thus remaining there shall be added the following:

Gross revenue derived from express transportation operations over any lines not under Federal control, less payments to such lines

under contracts in force with them; all miscellaneous income derived from express operations, including rentals, compensation received for the sales of money orders or other financial paper, charges assessed in addition to transportation charges, such as value charges, and income from money or securities invested in the dividend guaranty fund as described in paragraph 4 of this section. The resulting total shall be known as "Gross Contract Income."

From the gross contract income as here defined, the Express Company shall defray the operating expenses, rentals, taxes, except war taxes, and any other proper expenditures not disapproved by the Director General incurred in express operations, the remainder being termed "Contract Income for Division." The term "Operating expenses," as herein used, shall embrace all items prescribed by the Interstate Commerce Commission's classification of express accounts as operating expenses for express companies.

From the contract income for division, an amount equal to 5 per cent of the total par value of the outstanding capital stock of the express company shall first be set apart for the payment of dividends or general corporate purposes, herein termed "Primary allowance," which shall be cumulative. Any excess of contract income for division over said primary allowance, up to 2 per cent of the par value of the capital stock of the Express Company, shall be divided one-half to the Director General. The remainder to the extent necessary shall be paid into a guaranty fund, which fund shall not at any time ex- [fol. 104] ceed an amount equivalent to 10 per cent of the total par value of the outstanding capital stock. This fund shall be held by the Express Company to insure its ability to pay for each year during the life of this contract an amount equal to 5 per cent upon the total par value of its capital stock from July 1, 1918. Any earnings from such fund shall be considered as contract income for division.

If the contract income for division in any year shall not be equal to five per cent of the capital stock as herein provided, any amount lacking shall be withdrawn from said guaranty fund to supply such deficiency to the extent that said fund is sufficient for that purpose, and the said fund shall thereafter be restored from the contract income for division after deducting the five per cent primary allowances and the next two (2) per cent as hereinbefore provided, in the same manner at the fund originally created. Provided that should there not be a sufficient sum in said guaranty fund to furnish the amount necessary to pay said primary allowances at any time, the said deficiency shall be paid from said fund when there shall be sufficient money therein.

Any amount in said guaranty fund at the termination of this contract, or that may be due thereto and not required for the purpose for which the fund was established, shall be divided between the Express Company and the Director General in the proportion of forty per cent to said Express Company and sixty per cent to the Director General.

After the accumulation of the guaranty fund, any contract income for division in excess of the said five per cent primary allowance and the said two (2) per cent hereinbefore provided shall be divided as follows:

The next three (3) per cent upon the total par value of said capital stock in the proportion of one-third to said company and two-thirds to the Director General and any sum beyond that amount in proportion of one-fourth to said company and three-fourths to the Director General.

[fol. 105] It is the understanding and agreement of the parties that the "contract income for division" is not the income of property of the Express Company but is a fund resulting from the terms of this agreement in which the Director General and the Express Company have a mutual interest. The Express Company has no right to any portion of this fund except that which it finally retains under the terms of this agreement and which is the compensation paid it by the Director General for the performance of its service as the agent of the Director General in the transaction of this express business. Only that portion of the fund belonging to the Express Company shall be included in the net income of the Express Company for taxation under titles 1 and 2 of an act entitled "An act to provide revenue to defray war expenses, and for other purposes," approved October 3, 1917, or any act in addition thereto or any amendment thereof or any supplements thereto. If the Express Company shall be required to pay said war taxes upon any part of the contract income for division belonging to the Director General, the Director General shall and does hereby indemnify and save harmless the Express Company against any payments that may hereafter be demanded of or imposed upon said Express Company on account of taxes that may be levied under titles 1 and 2 of said act upon that part of the said contract income for division paid or credited to the Director General hereunder.

The term "Revenues Earned," as used herein, is intended to mean the amount of revenue earned for the service performed, less any sums subsequently determined to be uncollectible.

IX

The Express Company shall, within sixty (60) days after the end of each calendar month, pay to the Director General a sum [fol. 106] of money equivalent as nearly as may be to the percentage of gross revenues earned in such month provided for in the first paragraph of Section VIII; within sixty (60) days after June 30 and December 31st of each year, the Express Company shall render to the Director General a statement in such form and detail as he shall require, showing the gross revenues earned in said six (6) months' period ending with June 30th and December 31st, and within ten (10) days thereafter it shall pay to the Director General the balance, if any, due to the Director General under the first paragraph of Section VIII.

Within ninety (90) days after the end of each calendar year or the termination of Federal control said Express Company shall render to the Director General a statement in such form and detail as he shall require, showing the results of operation of said Express Company under this contract in a year or part thereof, determined as hereinbefore provided, and within ten (10) days after

the rendition of said statement, shall pay to the Director General whatever sum shall be due to him under this contract.

X

The salaries paid by the Express Company to its officers shall be reasonable. All salaries in excess of $10,000 a year shall be reported to the Director General. If he shall determine that any such salary is unreasonable and shall notify the Express Company in writing the maximum salary which he regards as reasonable, any amount in excess of such maximum salary so fixed shall be paid to such officer for salary after the giving of such notice shall be excluded from any accounts of the Express Company used in determining the contract income for division.

XI

The accounts of the Express Company shall be kept in form for and manner prescribed by the Interstate Commerce Commission [fol. 107] and the Government shall have the right to inspect such accounts at any and all reasonable times through its duly authorized agents; but the Express Company shall not be required to apportion its earnings among the various individual railroad lines and systems or to ascertain the earnings accruing on any individual railroad under Federal control, and the Director General may from time to time require the Express Company to furnish such statistics or special statements as may be reasonably necessary in connection with the operation under this contract.

XII

The Director General shall have the right to require the transportation without charge by the Express Company over any and all lines of railroad under Federal control of all packages of money, valuables, papers, and shipments of materials and supplies ordinarily forwarded by express, used in the operation of any railroad under Federal control. Provided, however, That the Express Company shall not be liable for loss or injury of said shipments so carried unless caused by the theft, dishonesty, or carelessness of the employees of the Express Company. When the Express Company and the railroad under Federal control employ the same agents, the receipt of the express messenger on the train for railway property shall constitute a delivery to the Express Company and the receipt of the party to whom the packages may be addressed or his representative shall constitute a delivery by the Express Company.

XIII

The Director General will transport upon the passenger and express trains of the lines covered by this contract free of charge, [fol. 108] on passes to be issued by the Director General or proper

railway official on proper application therefor, the officers, agents, and employees of the Express Company whom traveling in the interest of or upon the business of said Express Company. He will also transport free of charge upon the freight trains of the lines covered by this contract the equipment and materials of the Express Company required for use by it on the lines covered by this contract, but no hay, grain, or other feed stuffs shall be so transported for more than 500 miles. He will also transport free of charge equipment, stationery, and office supplies of the Express Company in cars or parts of cars set apart for the use of the Express Company. The Express Company assumes the risk of loss or damage resulting from all such transportation and agree to indemnify and save harmless the Director General or any individual railroad under Federal control covered by this contract involved therein from all claims for loss or damages arising from such transportation.

XIV

The Director General will transmit for the Express Company, free of charge over all telegraph or telephone of individual railroads or railroad systems lines operated as a part of said lines of railroad under Federal control covered by this contract, all business messages relating to the express transportation business of such railroads or railroad systems to be conducted by said Express Company; Provided, however, That the Express Company releases and holds harmless the Director General or any Railroad Company from all liabilities arising from any error or delay in the transmission of such messages or from failure to forward and deliver [fol. 109] the same.

XV

The Director General may employ any of the employees of the Express Company upon such reasonable terms as shall be agreed upon between the parties, and the Express Company may employ such employees of the Director General or agents of the railroads, and upon such terms as may be agreed upon from time to time by the Director General and the Express Company. Where station agents of the Director General or of the railroad are employed by the Express Company, the Director General shall pay such agents the entire compensation for their services to the Director General, the railroads, and the Express Company, and no payment shall be made direct by the Express Company to any such agent whose services may be so furnished by the Director General. The Express Company shall pay to the Director General the usual commissions heretofore paid upon express transportation business at stations where such station agents are joint agents as to its share of the agents' compensation.

Liability for personal injury or death of any joint employee, when it can be determined that such injury or death was sustained while the employee was engaged exclusively in express service, will

be borne by the Express Company, and the Express Company will bear all costs and expenses incident to the settlement thereof. When it can be determined that such inj-ry or death was sustained while the employee was engaged exclusively in railroad service, the Director General will bear all costs and expenses incident to the settlement thereof. Where the cause or causes of such injury or death can not be determined the Express Company and the Director General will bear the same in proportion in which the wages paid by each bear to the total compensation, in which latter case no settlement shall be made by either party without the consent of the other.

[fol. 110]

XVI

When cars other than the regular equipment assigned for express traffic are requested by the Express Company in order to carry shipments of an unusual character, and such cars are furnished by the Director General, said Express Company shall pay the expense of fitting up such cars for its use and of restoring the same to their normal conditions thereafter, the reasonable compensation therefor to be determined by the Director General.

XVII

The Express Company will -oad and unl*a*od its express matter, or require the shippers and consignees to do so, upon or from all cars assigned regularly or specially to express transportation traffic.

XVIII

All of the agents and employees of the Express Company while on the premises or on lines of railroads under Federal control covered by this contract shall at all times conform to the general rules in force thereon, and in case any messenger or other employee on any said line shall from any cause be objectionable to the Director General he shall be removed or discharged upon the written request of the Director General or of the Director General's principal operating representative on such line.

XIX

The Director General shall allow the Express Company the usual mileage rates on all cars belonging to the Express Company and used in handling the business under this contract over the railroad lines operated and controlled by the Director General. The mileage, [fol. 111] compensation allowed by the Director General to the Express Company shall be considered a part of the gross contract income of the Express Company.

XX

The Express Company will take over and continue the payment of pensions to former employees of the several express companies,

which employees have heretofore been pensioned under their rules, but no such pension shall exceed One Hundred and Twenty-five ($125.00) Dollars per month. The officers and employees of the several express companies who may be employed by the Express Company shall retain the same rights to pension from said new corporation as they have at the time of change in employment. The plan and pension rules of the Express Company shall be submitted to the Director General and if disapproved by him in any particular shall not become effective until so modified as to meet his approval; the sums paid on account of such pensions shall be charged to operating expenses.

XXI

The Express Company will enter into a contract with the Express Companies, parties to the memorandum of agreement with the United States, dated —— —, 1918, for the period of this contract as the agent of said Express Companies in their foreign business and for the handling of money orders and other financial paper, and for such other purposes as may be desired, unless in the judgment of the Director General the express transportation business conducted by said Express Company will be prejudiced thereby. The Express Company shall be paid by said Express Companies such compensation for its services as shall be agreed upon between the parties from time [fol. 112] to time as fair and reasonable which compensation shall be considered as a part of the gross contract income of the Express Company. The Director General, however, may require said contract to be submitted to him for his approval, and no contract disapproved by him shall thereafter be effective between the parties.

XXII

The Director General will perform all necessary switching service for cars in express service on the lines under Federal control covered by this contract, such as ordinary switching in connection with regular trains at stations which involves movement to and from the stations, and also to and from a track or siding assigned for the handling of express traffic and interchange of cars between railroads over which the Express Company operates, and cars loaded with live stock in transit to and from stockyards for feed, water, and rest in compliance with the law and service necessary by reason of the failure of the railroads to make schedule connection. For unusual or extraordinary service rendered, such as special switching to and from industry tracks or occasioned by reconsignment of cars and service of like nature, the Express Company shall pay compensation at the rate or charge of the railroads made for similar services to other parties.

XXIII

The Express Company agrees that the icing and refrigeration of cars in the service of the Express Company while on the lines covered by this contract shall be performed by the agency employed by the

Director General for this purpose, the Director General agreeing that the charges for such service shall be reasonable.

[fol. 113] XXIV

No evidence of indebtedness except ordinary banking or commercial loans for current purposes shall be made or issued by the Express Company without the prior approval in writing of the Director General; nor shall any lien of any kind be placed by it upon any property of the new corporation without the prior approval in writing of the Director General. All loans shall be reported to the Director General as soon as made.

The stock issued by the Express Company shall be sufficient to pay at par for the property transferred to it and to provide the cash necessary for working capital. The initial issue of the stock of the Express Company shall not be made until such issue *have* been approved in writing by the Director General. From time to time thereafter as additional funds may be necessary to purchase additional property or reimburse the company for additional property purchased or for working capital, additional stock may be issued by the Express Company, but no issue shall be made without the approval in writing of the Director General.

XXV

Either party to this contract may, after July 1, 1922, by not less than six months' notice in writing, to the other party, cancel this contract.

XXVI

The Express Company agrees that it will at any time during the existence of this contract, upon terms to be agreed upon between the parties hereto, establish at such places as may be designated by the Director General, collection and delivery service for baggage and less than carload shipments of freight.

[fol. 114] XXVII

If during the operation under this contract the gross contract income hereunder for any contract year shall not be sufficient to pay the operating expense and taxes of the Express Company for such contract year, it is agreed that the amount of any such deficit shall be deducted from any payments due the Director General thereafter, as a further allowance by the Director General to the Express Company.

XXVIII

Any controversy which may arise as to the performance of any part of this contract shall be submitted to and determined by the Interstate Commerce Commission after full hearing, and its decision thereof shall be final.

XXIX

The term "Capital stock" or "outs-anding capital stock," shall mean and include only stock issued by the Express Company upon the approval of the Director General and not cancelled.

The term "Director General," as used herein, shall be taken to apply to any official or person who may now exercise the authority of the United States with respect to said lines of railroad under Federal control, or may hereafter, as the successor of the Director General, exercise such authority.

The word "railroad," as used herein, shall include all systems of transportation and appurtenances thereto under Federal control covered by this contract.

Execution

In witness whereof these presents in duplicate originals have, on [fol. 115] the day and year first above written, been duly signed and delivered by William G. McAdoo, Director General of Railroads, and duly signed, sealed, and delivered by the American Railway Express Company, by George C. Taylor, its president, thereto duly authorized by a vote of the directors of the company at a meeting duly called and held on June 26, 1918, certificate of which authorization, duly attested by the company's secretary, is hereto attached.

William G. McAdoo, Director General of Railroads, by Walker D. Hines, Assistant Director General. American Railway Express Co., by George C. Taylor, Its President. Attest: F. P. Small, Secretary.

Certificate of Approval by Board of Directors of American Railway Express Company

At a meeting of the board of Directors of the American Railway Express Company, held at the office of the company at 65 Broadway, in the city of New York, on the 26th day of June, 1918, on motion duly made, and seconded, and carried, it was

Resolved, That the attached draft of proposed contract between the Director General of Railroads and the American Railway Express Company, relating to the operation, compensation, and other matters connected with the express transportation business over the transportation systems under Federal control, be approved and the President and Secretary be instructed to execute the same.

George C. Taylor. Attest: F. P. Small, Secretary.

[fol. 116] HARLAN CIRCUIT COURT

[Title omitted]

AGREEMENT AS TO TESTIMONY OF K. E. STOCKTON—Filed May 9, 1923

It is agreed by and between the parties to this action that the testimony of K. E. Stockton as a witness for and on behalf of the defendant American Railway Express Company, be, and the same is as follows:

"I am an attorney at Law, admitted to practice in all the courts of the State of New York, and I am thoroughly familiar with the general adjective and substance of law as administered by the courts of the State of New York. I am familiar with the form of organization of the Adams Express Company, and can state from my own personal knowledge that said company is a joint stock association, organized under the Common law of the State of New York. Under the Statute Law of the State of New York, and the decisions of its courts, a joint stock association whose articles of association do not contain any limitations on the liability of stockholders, is practically the equivalent of a general partnership. All the stockholders of the joint association are jointly and severally liable for all the liabilities and obligations of the joint stock association may be sued in the name of a representative officer for convenience, this does not destroy the creditors' right of action against each and every stockholder of the association, and suit may be brought against them sin- [fol. 117] gly or collectively for any and all obligations or liabilities of the joint stock association incurred while they are stockholders thereof. Such joint stock association may be formed without obtaining the consent of any officer of the State of New York, and there are not restrictions, or limitations of their powers other than those to which general partnerships are liable.

That on the —— —, ——, 1919, the defendant Adams Railway Express Company made an application to the Interstate Commerce Commission to approve a consolidation of the Express business of the four road express companies in the United States, pursuant to a provision of the Act of Congress in 1920, said application came on for hearing and the commissioner rendered a decision as set forth in exhibit B annexed hereto.

The Commonwealth of Ky. J. S. Forrester, Atty. for Plff.
J. B. Snyder & J. C. Adkins, Attorneys for Defendant American Railway Express Company.

[File endorsement omitted.]

[fol. 118] EXHIBIT A IN EVIDENCE

Approve and authorize the consolidation of the express transportation business and the property devoted to that business of the Adams,

American, Wells, Fargo & Co., and Southern Express Companies, and the consolidation of said companies so far as said business and property is concerned, into your petition, a Delaware corporation, as provided in Section 407, of the Transportation Act of 1920, amending Section 5 of the Interstate Commerce Act, and more particularly paragraph 7 of said Section 407 of said Transportation Act of 1920.

American Railway Express Company, by G. C. Taylor, President. T. B. Harrison, Attorney, 49 Broadway, New York.

PLAINTIFF'S EXHIBIT 8

Plaintiff offers in evidence Exhibit 8, being the report of Interstate Commerce Commission said applications (7-A and 7-B) and its order in reference thereto.

Exhibit 8 is as follows:

INTERSTATE COMMERCE COMMISSION

No. 11365

In the Matter of the Application for Consolidation of Express Companies

Submitted August 18, 1920. Decided December 7, 1920

Consolidation of express transportation business and property devoted to that business of the Adams, American, Wells Fargo & Company, and Southern Express Companies into the American [fol. 119] Railway Express Company approved and authorized.

T. B. Harrison and J. H. Mooers for America- Railway Express Company and C. W. Stockton for Adams Express Company, Southern Express Company, and Wells Fargo Company.

Frank Robertson, attorney general, for State of Mississippi; Mason Manghum for State Corporation Commission of Virginia; Morgan T. Donnelly for Public Service Commission, First District, State of New York, and John E. Benton for National Association of Railway and Utilities Commissions and various state commissions.

William N. Neff for certain southwestern railroads and receivers.

Alfred P. Thom and Alfred P. Thom, Jr., for Association of Railway Executives.

H. G. Herbel for southwestern lines; Winslow S. Pierce, Lawrence Greer, and F. C. Nicodemus, Jr., for Wabash Railway Company; and Twyman O. Abbot for Pere Marquette Railway Company.

Joseph H. Beck for National Industrial Traffic League and Boston Chamber of Commerce.

H. Hurwitz for Shafton Company.

Mac Asbill for Southern Wholesale Groecers' Association and American Cotton Manufacturers' Association.

J. Leo Honigman of New York Mercantile Exchange and National Poultry, Butter & Eggs Association.

George A. Hamma for various Cincinnati, Ohio, interests.

[fol. 120] E. E. Wilson for National Poultry, Butter & Egg Association and Boston Fruit & Produce Exchange.

Harrison F. Jones for National Poultry, Butter & Egg Association.

Report of the Commission by the Commission

By application filed March 22, 1920, as amended, we are requested to approve and authorize the consolidation of the express transportation business and the property devoted to that business of the Adams, American, Wells Fargo & Company, hereinafter referred to as the Wells Fargo, and Southern express companies into the American Railway Express Company, hereinafter called applicant. The application is made under paragraph (7) of Section 5 of the Interstate Commerce Act, as amended by Section 407 of the Transportation Act, 1920, and reading as follows:

The power and authority of the Commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four exrpress companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made to the Commission within thirty days after the passage of this amendatory act, and pending the decision of the Commission such consolidation shall not be dissolved.

At the beginning of the period of federal control there were seven express companies operating over the railroads of the United States, the Adams, American, Wells Fargo, Southern, Great Northern, Western and Northern express companies. Of these, the first four [fol. 121] names operated over approximately 95 per cent of the express business of the country. After the Government assumed control and operation of the railroads the Director General of Railroads declined to carry out the separate contracts between the railroads and express companies under which the express business had heretofore been conducted, but advised the express companies that if they would form a single corporation he would make a contract with that corporation to conduct the express business as his agent. In June, 1918, the Adams, American, Wells Fargo, and Southern express companies, which jointly had secured by lease the express business and the property devoted to that business of the other express companies hereinbefore mentioned, entered into a contract with the Director General by which it was provided that the express companies would cause to be organized a corporation to carry on the express transportation business for the Director General. Thereupon the American Railway Express Company was organized unt- -eh laws of Delaware and, under a contract with the Director General, took over the express business upon the railroads under federal control as agent of the Director General. The Adams, American, Wells Fargo, and Southern express companies exchanged all the property

devoted by them to the express transportation business, estimated by the Director General to be of the value of $30,000,000, as of November 30, 1917, together with 93,000,000 in cash for working capital, for the stock of the American Railway Express Company. Including additions and betterments not charged to operating ex- [fol. 122] pense made between the latter date and July 1, 1918, the authorized issue of capital stock of the applicant at par aggregated $34,642,109.64.

A number of protesta against the approval and authorization of the consolidation in the from of resolutions adopted by commercial organizations, letters, and telegrams, have been received by us. In most of these complaint is made that the service rendered by applicant was and is inadequate and unsatisfactory, and this is attributed largely to the lack of competition. In a number of others the policy of at least two of the predecessor companies with respect to the adjustment of claims which arose prior to the consolidation is criticized, and it is urged that if the consolidation is authorized suitable provision should be made to protect the rights of claimants.

The railroad commissions or other public utilities commissions of 33 of the states were represented at the hearing. Only 4 states voiced objection to granting the application on ground other than the matter of old claims against the Adams and Southern express companies. The State Corporation Commission of Virginia offered evidence regarding the claims situation, but the other state commissions offered no evidence. A representative of the Richmond Chamber of Commerce also testified with respect to the claims situation. Representatives of the National Poultry, Butter & Eggs Association, which has 1,200 members scattered throughout the country, and the Boston Fruit & Produce Exchange, which has a membership of 900, offered evidence to show that applicant's service was inadequate. [fol. 123] They contend that this is due to lack of competition and are opposed to the continuance of the consolidation. A representative of the National Industrial Traffic league, an association of commercial organizations, firms, and individuals, located at points throughout the country, appeared on behalf of that organization, the Boston Chamber of Commerce, and the New England Traffic League in support of the application.

Applicant admits that its service has been ans is unsatisfactory, but attributes this to abnormal conditions growing out of the war. In explanation of this conditions the testimony offered for applicant may be summarized as follows:

When applicant began business the transportation agencies of the country were in a very bad condition owing to the war. This situation had existed for some time prior to the beginning of federal control. The rail- companies operating over the major mileage of lines in the United States had violated their contracts with the express companies for many months preceding the period of federal control. At the time of entering into its contract with the Director General, applicant was assured that better facilities and equipment would be furnished after it began business, but the conditions were such that these assurances could not be carried out, except in part. Im-

mediately prior to federal control, due to war-time demands for equipment, the railroads were unable to supply a sufficient number of cars *fo* the proper type to enable the express companies to render their usual service. Many of the cars customarily used in express [fol. 124] service were used by the government in the movement of troops. This accentuated an already bad situation, with the result that the express company had to utilize any kind of equipment available, and not much was available but box cars not equipped for high speed and neither lighted nor heated. Even when it was able to secure first-class equipment suitable for hich speed and placed it in trains, the speed of the trains was slowed down to that required for inferior equipment therein. In addition to being called upon to transport traffic which ordinarily moved by *by* express, it was required to handle a large amount of government war business which ordinarily should have moved as freight. This traffic embraced not only merchandise but also high explosives moving in carloads and train loads. Prior to our entering the war a great many industrial concerns devoted to the manufacture of war supplies and ammunication for European nations came into being, and as the wages paid employees in those concerns were higher than those paid to employees of the express companies many of the latter left the service for employment in those plants. After this country entered the war many experienced men were lost to the express companies by reason of voluntary enlistments or by draft. The inability of the railroads to furnish sufficient and proper facilities, and the numerous embargoes issued by them on certain classes of freight, forced upon applicant a large volume of traffic which ordinarily moved in less than carload lots by freight. The express business had increased rapidly and continuously for some years, and the additional traffic forced upon applicant taxed its facilities to [fol. 125] the utmost, made it impossible to secure sufficient street equipment to handle the enormous volume of business, and prevented applicant from furnishing the service it desired to give.

Applicant urges that the service rendered by it, admittedly not satisfactory, has been and is far better than could have been performed by the pre-cessor companies, because the unification of their facilities under the one management effected by the consolidation permitted better distribution of those facilities and rendered practicable many economies impossible under separate operation. It is said that formerly each of the predecessor companies had its quota of vehicles transversing the same routes both in the pick-up and delivery service, carrying on many occasions only partial loads. The consolidation enabled this equipment to be handled as a whole and distributed throughout the cities so that the vehicles were utilized more nearly to their capacity, besides avoiding duplication of service.

It was testified that great savings had been accomplished by reason of one company's transacting the business in lieu of four as formerly, through the elimination of duplicate wagon service, duplicate offices in various cities, the establishment of a uniform accounting system and the consolidation of various departments of express business into

one. It is estimated that these methods have reduced the cost of operation over $13,000,000 annually below what it would have cost the former companies.

Applicant states that better service also results by reason of the [fol. 126] fact that the consolidated company routes traffic via the direct lines, thus reducing distance and time of transportation. It is said that with two or more companies in the field it was natural that those companies should endeavor to secure the long haul on traffic. As an illustration, it was testified that formerly three companies operated in New York City, the American, Adams and Wells Fargo. Shipments from New York to Pittsburgh, Pa., could be delivered at destination by any one of three companies. The American Express Company operqted over the New York Central Lines, and its route to Pittsburgh was via Ashtabula and Youngstown, Ohio. The Adams Express Company operated over the Pennsylvania Railroad, the direct route, and the express matter dispatched by it would be delivered in Pittsburgh before the traffic handled by the American had passed Buffalo en route to Pittsburgh.

The commissions of Florida, Louisiana, Mississippi and Texas oppose without reservation the granting of the application on the ground that monopoly will be created which can never be broken; that the competing railway systems which are to come into existence under the plan of this Commission in accordance with the provisions of the Interstate Commerce Act ought, in the public interest, so far as possible, to be served by competing express companies; and that hence this consolidation must necessarily be out of harmony with any plan which we may make for consolidation of rail lines.

It is urged by applicant that the consolidation of these companies [fol. 127] was not voluntarily accomplished for the purpose of securing a monopoly of the express business but that it was compelled by the conditions and circumstances existing at the time. It is insisted that the approval by us of the organization and its continuance in business will not destroy competition; that applicant at present competes for a large part of its business with the parcel post, which operates on all lines in the United States; that in normal times it competes for package business with fast freight line hauling less than car load traffic; and that it is in direct and keem competition with motor trucks which operate over considerable distances between principle cities in general. It is further said that it is doubtful if the old companies would resume business. Officials of the Wells Fargo, Adams and Southern companies testified that they would advise those companies against returning to the express transportation business. The provisions of the Interstate Commerce Act with respect to prospective consolidation of rail carriers contemplate that competition shall be preserved but do not require that competition shall be inaugurated or increased.

It is further urged on behalf of the four state commissions last named that under subparagraph (b) of paragraph (6) of section 5 of the Interstate Commerce Act, as amended, we must first find the value of the properties now operated by the applicant before we

can authorize this consolidation. The provision referred to reads as follows:

The bounds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding [fol. 128] capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the Commission. The value of the properties sought to be consolidated shall be ascertained by the Commission under Section 19a of this Act, and it shall be the duty of the Commission to proceed immediately to the ascertainment of such value for the properties involved in a *por*posed consolidation upon the filing of the application for such consolidation.

It is argued that this provision is designed to prevent over-capitalization of the company in acquiring the property of consolidating rail carriers; and that there is as much reason for preventing over-capitalization in the case of an express company as in the case of a rail carrier. The consolidation here in question has been accomplished, and we are of the opinion that it is governed by paragraph (7) of Section 5, rather than b*u sbu*paragraph (b) of paragraph (6) of Section 5. Therefore it is not necessary as a condition precedent to its approval and authorization that we ascertain the value of the properties *ac* consolidated.

On behalf of the Wabash Railroad it is stated that on June 1, 1911, that road entered into a contract with the Wells Fargo providing for the conduct of the express business on the lines of that carrier for a period of 20 years commencing August 1, 1911; that when the government assumed control of the railroads the Wabash Railroad was unable in its own name to continue operation under the contracts but that under an arrangement with the Director General, [fol. 129] who declined to be bound by any of the contracts between the express companies and the rail carriers, the Wells Fargo continued to operate over the lines of the Wabash Railway; that when the consolidation of the express companies was effected the Wells Fargo announced that it was no longer bound by the contract with the Wabash; and that since the termination of federal control the Wells Fargo and the consolidated company have declined to be bound by the terms of the contract. It appears that the Wabash Railway brought suit to recover under the contract approximately $190,000 from the Wells Fargo for services rendered the company during the period of federal control preceding the consolidation of the express companies and that this suit is pending in the courts. The Wabash Railway asks that we impose as a condition precedent to the approval of the application here in question that applicant assumes and discharge the obligation of the Wells Fargo, or that the consolidated company assume and carry out the contract referred to, subject to the determination of its validity and enforceability as against the Wells Fargo by a court of competent jurisdiction. The president of the Wells Fargo testified that that company was able and willing to pay any judgment rendered against it in the

courts. We think that this controversy between carriers is one which should be determined by the courts and that the imposition of the condition requested by the Wabash Railway is not such as is necessary or required in the public interest.

One of the objections to the unqualified approval of the consolidadation which is almost strongly urged upon our consideration arises [fol. 130] from the policy of the Adams and Southern express companies in the settlement of loss and damage claims which accrued prior to the consolidation. When applicant took over the express business July 1, 1918, an arrangement was made between it and the predecessor companies whereby claims which had arisen against the latter were adjusted by applicant for account of the predecessor companies. On June 11, 1919, the predecessor companies issued a joint circular signed by the president of each, addressed to their officers, agents, and employes, as follows:

We are beginning to find evidence of anxiety among patrons who have claims outstanding against our respective companies, the impression seeming to prevail that unless the claims are paid before July 1st, there would be difficulty in collecting them.

We want to say to you that there is no need for any anxiety on the part of any patron *of* shipper, as an agreement has been entered into between our respective companies whereby the handling of these claims will be undertaken by the new company. No suits are necessary as the new company will undertake to dispose of all of these matters with promptness and without unnecessary trouble or annoyance to our patrons.

It is hoped through this notice that persons having claims against our several companies will more fully understand the conditions that obtain, and be willing to allow their claims to take the same course as has been followed in the past. The new company will be as anxious as the public to have all old claims disposed of and out of the way [fol. 131] and every energy will be put forth in that direction.

From the time it began business until the early part of 1919, applicant made settlement of the claims which had accrued against all the predecessor companies, and it still continues the adjustment of the claims which accrued against the American and Wells Fargo express companies.

Applicant submitted a statement taken from its books showing that from July 1, 1918 to June 20, 1920, it paid and charted in the accounts of the predecessor companies loss and damage claims aggregating $4,503,450.01 for the Adams; $4,131,026.16 for the American; $1,064,775.30 for the Southern; $2,926,793.99 for the Wells Fargo; and that it also paid for its own account claims amounting to $29,492,644.82. The amounts of the claims against the predecessor companies on July 1, 1918, are not shown. Witnesses for predecessor companies estimated that on July 1, 1920, claims still pending, exclusive of those on which suits had been filed, amounted to $75,000 against the American; $70,000 against the Wells Fargo; and between $50,000 and $60,000 against the Adams and Southern,

respectively. Since the argument, in compliance with a request made at the hearing, counsel for Adams and Southern express companies, by letter, states that the claims filed against those companies for loss and damage amounted to $11,285,675.97; that the total amount paid by and for these companies for loss and damage to July 1, 1920, was $6,924,305.60, leaving a balance of $4,361,370.37 unpaid of which $2,982,863.82, it is said, represents claims withdrawn by [fol. 132] claimants and claims declined for various reasons, and $1,979,206.55 represents unsettled claims, mostly the subject of suits.

In the early part of 1919 the Adams and Southern express companies withdraw from the former arrangement, and since have themselves conducted the adjustment of claims filed against them. Many protests have been received and evidence was offered at the hearing, criticizing the treatment accorded claimants by these companies. It is said that their withdrawal from the former arrangement necessitated the presentation of claims at their office in New York City; that they had no agents or property in states other than New York and that legal service could be made upon them only in New York. It is further said that in many instances little or no attention was given to letters from claimants, and that in some instances, while in correspondence with the companies with respect to claims and before any declination of the claims, claimants were advised that their claims were barred by the two year and one day limitation clause contained in the express receipt. Even after offering assurances to those seeking adjustment of claims through correspondence that the limitation period would not debar claims until 30 days after declination claims were advised, without prior declination, that such claims were barred by the limitation clauses. They finally offered to settle claims on a basis of 60 per cent provided the claims were prima facie valid. This offer, at first made to individual claimants, was given general publicity. It was testified by one of the protestants that the acceptance of this offer was without avail.

[fol. 133] On behalf of the Adams & Southern express companies it was testified:

In February of 1919, the Adams Express Company found itself in a very serious situation. The claim liability reported by the American Railway Express Company at that time was nearly $5,000,000. The actual outstanding claims developing since that time increased that to upwards of $8,600,000. The Adams Express Company's finances were not in such shape to meet those matters as they stood at that time. It was a very serious question as to whether they would be able to survive without going through a receivership, and having recourse on the liability of their individual stockholders, careful study of the situation developed the idea that the Adams Express Company might be able to put out and the Southern as well by confirming their payments to the strict liability. The managers of the Adams Express Company decided they would pay their strict legal liabilities and no more, feeling that they stood as trustees on the one hand to the stockholders and on the other that they could not afford to be liberal to either at the expense of the other and that therefore the only policy they could pursue would be to take the same position they would have taken in behalf of the receivership and to

confine payments to the strict legal liabilities of the company in every case, without discrimination, and that course was followed to the letter by both the Southern Express Company and the Adams Express Company.

It was further testified that the Adams and Southern express com- [fol. 134] panies had voluntarily accepted service in a large number of suits brought against them in states other than New York, but that they had declined to do so increase where they would be at a disadvantage and were of the opinion that they could not obtain substantial justice. With respect to the 60 per cent offer made by these companies it was stated that this was a measure adopted to expedite settlement in view of he enormous volume of loss and damage claims which it appeared hopeless to investigate to a conclusion within a reasonable time limit; and that an investigation of claims statistics indicated that approximately but 60 per cent of the aggregate amount of claims represented valid claims.

The record indicates that not only have these two companies disregarded their moral obligation with respect to many claims but that apparently they have endeavored by a studied plan to avoid even their strict legal liability. But little criticism is offered by protestants of the method of handling their claims against the American Express and Wells Fargo companies or against the consolidated company.

As previously observed, the consolidation having been accomplished there is today no actual competition between express companies. Even prior to federal control and the existing consolidation, there was practically no competition so far as express transportation rates and charges were concerned, express rates being made on the block system prescribed by us and applying alike to all express companies. While to some extent there was competition with respect to the service rendered, the economies and eliminations of wasteful services [fol. 135] resulting from the consolidation would appear to be more than sufficient to offset any disadvantage to the public growing out of the separate operation of the four express companies, even if, on a denial of this application, they should resume operations as such, as to which there appears to be some doubt. As to the rates and practices of the consolidated company, we may regulate and control them to the same extent as if there were separate operation.

While the methods of the Adams and Southern express companies in the settlement of claims against them merit the severest condemnation, we are not persuaded that the approval by us of the consolidation, if otherwise in the public interest, should be conditioned as urged by certain of the protestants so as to require the constituent companies to provide for the handling of claims and the service of legal process in the jurisdiction where they formerly operated and to revive claims which may have been barred by the two-year-and-one-day limitation with respect to filing suit. We are not authorized under the Interstate Comerce Act to approve the maintenance of the existing consolidation and in connection therewith to prescribe terms as to the manner in which these claims shall be handled as a condition of the continuance of the consolidation. Nor are we authorized

to require the resumption of operation by the constituent companies. We are merely empowered to approve and authorize the existing consolidation. The principal objections raised are that claimants must bring suit in New York and that many of the claims, while meritorious, are too small to justify the expense of suit. Under [fol. 136] such circumstances hardship obviously results to the claimants, but that does not justify us in requiring the express companies, as a condition precedent to our approval of the consolidation, to waive any legal defenses which they may elect to make in the courts. We have repeatedly held that we have no jurisdiction over claims for loss and damage. However, we do have jurisdiction to determine the reasonableness and propriety of carriers' published rules and regulations relating to transportations, and in National Industrial Traffic League v. Express Co., 58 I. C. C., 304, following Decker & Sons v. Director General, 55 I. C. C., 453, we found that the clause of the uniform express receipt limiting the period for filing suit to two years and one day after delivery or after a reasonable time for delivery was unreasonable in that it did not provide for a reasonable time within which to file suit after claims which had been under consideration by the express companies had been declined. While the courts have frequently upheld the right of a carrier to limit the period within which suit shall be brought against it, such limitation, to be successfully pleaded by the carrier, must be reasonable. Texas & Pac. Ry. Co. v. Leatherwood, 250 U. S. 478, 481; Mo., Kans. & Tex. Ry. v. Harriman, 222 U. S. 657, 672-673.

Upon consideration of all the facts and circumstances of record we are of opinion and find that the public interest will be promoted by the consolidation. An order will be entered approving and authorizing the consolidation.

[fol. 137] McChord, Commissioner, dissenting:

I cannot agree with the conclusion reached by the majority that the public interest will be promoted by this consolidation.

The authorization of the consolidation will destroy every semblance of competition in the express business both as to rates and service, thus confirming an existing monopoly. It may be true that there is no competition as to express transportation charges but, prior to the consolidation, there was competition with respect to services which was of benefit to the public. It will now be practically impossible for another company to enter into the express business in competition with this consolidated company. We, of course, may regulate the rates and certain of the practices of the American Railway Express Company, but we will have no control over its attitude toward the public. We can not require it to render to the public that efficiency, courtesy, and fair dealings which competition compels.

It is my view that the time has come when the carriers should give serious and further consideration to the question of conducting the express business themselves. That business has reached such proportions that it is now a parasite upon the freight traffic

of the railroads. They should no longer permit outside agencies to transact it. It can be clearly demonstrated that the carriers can readily adapt their existing organization, equipment and facilities to enable them to handle the additional traffic. It would need but slight extension of certain branches of their organization, the ac-[fol. 138] quisition of some additional equipment and possibly some enlargement of present facilities to place them in a position to satisfactorily conduct the express business, and at considerably less expense than it is being done by the express company. The transportation and handling of this class of traffic by the railroads would undoubtedly yield them greater profit than they receive under the present method, render it possible to materially reduce the charges for the service to the public and result in distinct and much needed improvement in the safety and celerity with which the traffic is handled.

Nor can I agree with the conclusion reached by the majority that we are merely empowered to approve and authorize the existing consolidation and cannot prescribe the terms and conditions under which the consolidation may be approved.

We are empowered under the act, with respect to the consolidation of railroads, to approve and authorize such consolidation "with such modification and upon suuch terms and conditions" as we may prescribe. The provisions of the act under which this application was filed reads, "The power and authority of the Commission to approve and authorize the consolidation of the four express companies. * * *"

It, therefore, necessarily follows that the same power with respect to approving and authorizing consolidation of railroads extends to the consolidation of the express companies.

[fol. 139] It is my view that in no event should we approve this consolidation without making provision for the protection of claimants in their loss and damage claims which accrued against the constitutent companies. When it is recalled that all the assets of the consolidated company were acquired from the constituent companies and that, as a matter of fact, the consolidation is nothing more or less than the merging of property of the constitutent companies, it is only just that that property should be subject in the various states to meritorious claims which accrued before the merger. Possessing the power to prescribe just and reasonable conditions precedent to the consolidation, our failure to so prescribe lays down the *bard* to the sharp practices of certain express companies set forth in the majority opinion. It is my view that we cannot escape the responsibility placed upon us by the Interstate Commerce Act in this matter, that has such grave and far reaching consequences, by merely stating that the courts have jurisdiction over loss-and-damage claims.

For these reasons I am unable to concur in the majority opinion.

Meyer, Commissioner, also dissents.

Order

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 7th Day of December, A. D. 1920.

No. 11365

In the Matter of the Application for Consolidation of Express Companies

[fol. 140] It appearing, that the American Railway Express Company has duly filed application for approval and authorization under paragraph (7), Section 5, of the Interstate Commerce Act as amended by Section 407 of the Transportation Act, 1920, of the consolidation of the express transportation business and property devoted to that business of the American Express Company, the Adams Express Company, Southern Express Company, and the Wells, Fargo & Company, and the consolidation of said four companies so far as said business and property are concerned into the American Railway Express Company, a Delaware corporation:

It further appearing, that a full investigation of the matters and things involved has been had and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

And it further appearing, that the public interest will be promoted

It is ordered, that said consolidation be, and it is hereby, approved and authorized.

By the Commission.

George B. McGinty, Secretary. (Seal.)

That attached to said exhibit is the following stipulation of parties:

It is stipulated that the within and foregoing printed matter is a true, complete and correct copy of the report of the Interstate Commerce Commission, its order, and the appearances for the va-[fol. 141] rious parties, in the above entitled matter, which was submitted to said commission, and that, in case either party in the case of Sam R. Gibson v. American Railway Express Company, pending in the Superior Court of Shenadoah, Iowa, offers the same in evidence at the trial thereof, the other party, not offering the same, will not make the objection that the same is not the best evidence or not certified, but reserves the right to make any other objection.

Sam R. Gibson, by Ferguson, Barnes & Ferguson, His Attorneys. American Railway Express Co., by Wilson & Keenan, Its Attorneys.

Defendant objects to Exhibit 8 as being incompetent, irrelevant and immaterial.

Plaintiff offered in evidence, Exhibit 9 being stipulation of parties as follows:

Whereas in response to the demand of plaintiff — for defendant has attached to its answer and amendment to answer certain copies of contracts bearing on the matter in controversy.

It is hereby agreed by the parties hereto that the same are true and correct copies of the originals of said contracts; and it is further agreed that neither party will object to the introduction of said copies in evidence on the ground that they are not properly identified, or not the best evidence.

Dated at Shenandoah, Iowa, this 8th day of December, 1920.

[fol. 142] STATE OF KENTUCKY,
County of Harlan, set:

CLERK'S CERTIFICATE

I, F. M. Jones, Clerk of the Harlan Circuit Court, certify that the foregoing is a true and correct copy of the record in the case of the Commonwealth of Kentucky vs. American Railway Express Company, &c., as the same appears of record in my office and on file therein.

Witness my hand as Clerk of the court aforesaid, this July 14, 1923.

F. M. Jones, Clerk Harlan Circuit Court.

[fol. 143] COURT OF APPEALS OF KENTUCKY

CLERK'S CERTIFICATE

I, Roy B. Speck, Clerk of the Court of Appeals of the State of Kentucky, hereby certify that the foregoing 144 pages of typewritten matter is a true and correct copy of the transcript of record and statement on appeal in the case of American Express Company v. Commonwealth of Kentucky filed in this office on August 20th, 1923.

In testimony whereof I have hereunto set my hand and affixed the seal of this Court.

Done in the Capitol at Frankfort, Kentucky, this 14th day of December, 1923.

Roy B. Speck, Clerk of the Court of Appeals. (Seal of Kentucky Court of Appeals.)

[fol. 144] KENTUCKY COURT OF APPEALS, FALL TERM, OCTOBER 30TH, 1923

[Title omitted]

JUDGMENT

The Court being sufficiently advised, it is considered that appellee's motion to affirm as a delay case be and the same is hereby sustained.

It is therefore considered that said judgment be affirmed. Which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended.

COURT OF APPEALS OF KENTUCKY

CLERK'S CERTIFICATE

I, Roy B. Speck, Clerk of the Court of Appeals of the State of Kentucky, hereby certify that the foregoing page of typewritten matter is a true and correct copy of the order affirming the case of the American Express Company v. Commonwealth of Kentucky as a delay case.

In testimony whereof I have hereunto set my hand and affixed the seal of this Court.

Done in the Capitol at Frankfort, Kentucky, this 14th day of December, 1923.

Roy B. Speck, Clerk of the Court of Appeals. (Seal of Kentucky Court of Appeals.)

SUPREME COURT OF THE UNITED STATES

[Title omitted]

On Petition for Writ of Certiorari to the Court of Appeals of the State of Kentucky

ORDER GRANTING PETITION—Filed April 21, 1924

On consideration of the petition for a writ of certiorari herein to the Court of Appeals of the State of Kentucky and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

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United States Supreme Court.

In the Matter

of

The Petition of AMERICAN RAILWAY EXPRESS COMPANY,

Petitioner,

—against—

THE COMMONWEALTH OF KENTUCKY,

Respondent,

For a Writ of Certiorari to the Court of Appeals of the State of Kentucky to bring before the Supreme Court the case of COMMONWEALTH OF KENTUCKY,

Plaintiff-Respondent,

—against—

AMERICAN RAILWAY EXPRESS COMPANY,

Defendant-Appellant.

Notice of Presentation.

Sir:

PLEASE TAKE NOTICE that upon a certified copy of the transcript of record herein and upon the annexed petition of American Railway Express Company, verified the 25th day of January, 1924, I shall submit the motion hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on the 18th day of February, 1924, at

the opening of court on that day or as soon thereafter as counsel can be heard; and that I shall then and there move for such further relief in the premises as may be just.

Dated, New York, January 25th, 1924.

Yours, &c.,

CHARLES W. STOCKTON,
Attorney for Petitioner,
Office & P. O. Address,
2 Rector Street,
Borough of Manhattan,
City of New York.

To:

THOMAS B. McGREGOR, Esq.,
Attorney for Respondent,
Frankfort, Ky.

Petition.

UNITED STATES SUPREME COURT.

In the Matter

of

The Petition of AMERICAN RAILWAY EXPRESS COMPANY,

Petitioner,

—against—

THE COMMONWEALTH OF KENTUCKY,

Respondent,

For a Writ of Certiorari to the Court of Appeals of the State of Kentucky to bring before the Supreme Court the case of COMMONWEALTH OF KENTUCKY,

Plaintiff-Respondent,

—against—

AMERICAN RAILWAY EXPRESS COMPANY,

Defendant-Appellant.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows as follows:

I. This is a petition for a writ of certiorari to review a judgment of the Court of Appeals of Kentucky, holding the petitioner, American Railway Express Company, liable for a judgment rendered against the Adams Express Company in a prosecution against the Adams Express Company, to which the American Railway Express

Company was not a party, to recover fines for alleged violations of a penal statute of the State of Kentucky. Said decision was based upon the fact that while said prosecutions were pending, the petitioner purchased from the Adams Express Company all of its property located in the State of Kentucky, issuing its stock in payment therefor.

II. Your petitioner is a corporation, organized in June, 1918, under the laws of the State of Delaware, pursuant to a contract theretofore entered into between the Government of the United States and the Adams Express Company, American Express Company, Southern Express Company and Wells Fargo & Company, dated June 21, 1918 (Record, p. 87).

III. The said Adams Express Company is a joint stock association organized under the common law of the State of New York, the members of which are unlimitedly liable for all the obligations and liabilities of said association (Record, p. 116).

IV. This action was brought to recover from the petitioner the amount of two judgments rendered against the said Adams Express Company. Said judgments were rendered in January, 1921, in prosecutions begun prior to June 30, 1918, by the Commonwealth of Kentucky against the Adams Express Company to recover fines for alleged violations of a penal statute of the State of Kentucky known as section 2569B of the Kentucky statutes (Record, p. 2).

V. This is the second case of this nature to come before this court and the Court of Appeals of Kentucky. The first case, involving the same parties and the same issues, was affirmed by the Court of Appeals of Kentucky in a lengthy opinion *American Railway Express* v. *Commonwealth*, 228 S. W. 433, which is set out in full in the Appendix, annexed to this application. That case was brought up to this court on a writ of error, but the appeal was dismissed October 8, 1923, on a *per curiam* memorandum, *American Railway Express Company* v. *Commonwealth of Kentucky*, United States Supreme Court, October Term, Advance Opinion 13:

> "October 8, 1923. *Per Curiam*: Dismissed for want of jurisdiction upon the authority of Section 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. Section 1214 Fed. Stat. Anno. Supp. 1918, p. 411), Section 2; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1, 5, 6, 64 L. ed. 421, 424, 40 Sup. Ct. Rep. 255."

VI. The complaint in the present action alleges the recovery of said judgments against said Adams Express Company and return of execution thereon unsatisfied and that the petitioner on June 30, 1918, acquired all the assets of said Adams Express Company in exchange for the issuance of capital stock of the petitioner and assumed all the liabilities of said Adams Express Company (Record, pp. 3, 4). The petitioner's answer denies that it acquired all the assets of said Adams Express Company and denies that it ever assumed any of the obligations of said Adams Express Company and sets forth several affirma

tive defenses, in one of which it alleges that the judgment asked for would deprive the petitioner of its property without due process of law and deny to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States (Record, p. 15).

VII. The present case came on for trial after the decision of the Court of Appeals of Kentucky in the prior case, and while the appeal in said prior case was pending in this court. Upon the trial the petitioner moved to dismiss the complaint on the ground that it sought to deprive the petitioner of its property without due process of law, and that to so take the property of the petitioner would deny it the equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States (Record, pp. 27, 28). However, said motions were denied and judgment was rendered in favor of the Commonwealth of Kentucky against the petitioner for the full amount of the said two original judgments against the Adams Express Company, over the objection and exception of the petitioner (Record, p. 29).

VIII. Thereafter petitioner appealed from the said judgment of the Circuit Court of Harlan County to the Court of Appeals of Kentucky. Said appeal came on for a hearing after the dismissal by this Court of the writ of error in the prior case. On October 30, 1923, the Kentucky Court of Appeals affirmed the judgment of the lower court without opinion. Said Court of Appeals is the highest court of the State of Kentucky and is the highest court of the State of

Kentucky in which a decision in this suit can be had.

IX. Your petitioner was organized under the following conditions: Prior to June 30, 1918, the Adams Express Company, American Express Company, Southern Express Company and Wells Fargo & Company were all engaged in the express transportation business in the United States. Said express companies were competitors and one or more of them operated in practically every State in the United States. Said express business required for its operations contracts with various railroad lines by which said railroad lines transported on passenger train schedule the shipments entrusted to said express companies for transportation, and also required said express companies to have offices located in every city in the United States, at which it was necessary to have horses, trucks and other equipment used in the express transportation business (Record, p. 71).

On December 28, 1917, the President of the United States acting under the war powers vested in him by Congress, took over practically all the railroad lines in the United States, vesting the possession and full control thereof in his agent W. G. McAdoo, Director General of Railroads.

Said W. G. McAdoo, as Director General of Railroads refused to continue the performance of the contracts between the various express companies above named and the companies owning the railroad lines under his control and refused to make any new agreements for railroad transportation service with the said express companies severally. However, he offered to deal with a

single corporation if the said express companies would transfer to it their operating equipment and personnel, used in the operation of a domestic express business (Record, p. 71).

Accordingly, on June 21, 1918, a contract was entered into between said W. G. McAdoo on behalf of the United States, and said Adams, American, Southern and Wells Fargo express companies, providing for the organization of the petitioner, American Railway Express Company (Record, p. 87), to carry on for the Director General, beginning July 1, 1918, the express transportation business upon the railroads and systems of transportation under Federal Control. Said agreement provided for a maximum issue of capital stock of the par value of $40,000,000. Said stock was to be issued at par in exchange for the domestic express operating equipment of the said express companies at its fair market value. No stock was to be issued for good will, contract rights, franchises or other intangible property. The said express companies were each to retain their individual existence and also their cash and treasury assets.

Pursuant to this agreement the Adams Express Company transferred to the petitioner on June 30, 1918, express operating equipment of the value of $8,600,000, and approximately $900,000 in cash for which stock of the petitioner was issued at par. At the same time the said other express companies transferred to the petitioner property and cash of the fair value of approximately $25,000,000, for which stock was issued to them at par. The petitioner is informed and believes that all the property belonging to the Adams Express Company in the State of Kentucky, of the ap-

proximate value of $93,000, was included in this transfer (Record, p. 78), but the Adams Express Company retained property in other States of the value of over $54,000,000.

X. Petitioner has never, either in writing or orally, assumed any of the obligations or liabilities of the said Adams Express Company and has never assumed the performance of any of its contracts or paid from its own funds any of the obligations or liabilities of the Adams Express Cmpany (Record, p. 35).

XI. There has been no legal or practical merger or consolidation of the said Adams Express Company into your petitioner. The affairs of the petitioner are managed and controlled by a Board of 12 directors of whom only four are in any way connected with the Adams Express Company. None of the officers or employees of the petitioner are officers or employees of or in any way connected with the Adams Express Company (Record, p. 35). Less than one-third of the capital stock of the petitioner is owned by the said Adams Express Company.

Petitioner is informed and believes that on June 30, 1918, in addition to its domestic express transportation business, the said Adams Express Company was engaged in the business of a foreign freight forwarder, the remittance of foreign exchange to consignees abroad and the issuance and sale of traveller's cheques and money orders (Record, p. 71); that it also owned, directly or through subsidiary corporations, a large amount of real and personal property which was not directly connected with the express business and which was never transferred to petitioner; and

that at that time the estimated value of the total gross assets of the Adams Express Company was approximately $63,000,000, of which the value of the equipment used in the operation of an express business and transferred to the petitioner was only $8,600,000 (Record, p. 74). Since July 30, 1918, the said Adams Express Company has maintained offices in the City of New York, State of New York, at which its executive offices are located (Record, p. 35); it has a bond issue outstanding which does not mature until 1948 (Record, p. 50); it has not distributed the stock received from the petitioner or any other capital assets to its stockholders (Record, p. 75) and has taken no steps looking toward a dissolution (Record, p. 43); in March, 1922, it resumed business in New York in the transportation of money and securities in armored cars (Record, p. 75). At all times since June 30, 1918, the said Adams Express Company has been solvent and has paid claims amounting to several millions of dollars, which have been handled from the New York office of said Adams Express Company (Record, p. 76).

XII. The questions of constitutional law involved on this application are:

> (1) Whether it is a lack of due process of law for the Kentucky Court to deprive the petitioner of its property on the following assumptions which are unsupported by the record and contrary to fact; (a) that the Adams Express Company is a corporation; (b) that the State of Kentucky was a creditor of the Adams Express Company on June 30, 1918; (c) that the stock issued to the Adams Express

Company was distributed by it among its shareholders.

(2) Whether petitioner is denied the equal protection of the laws by a decision of a state court which holds that a corporation which pays cash for property is a holder for value but that a corporation which issues less than a controlling interest of its own stock for property is a donee, and takes such property subject to existing claims of the vendor's creditors.

(3) Whether it is lack of due process for the state of Kentucky to enforce a rule that a *bona fide* purchaser for value of all the Kentucky property of a solvent vendor is liable to Kentucky creditors of the vendor to the extent of the value of the property acquired.

(4) Whether a decision of a state court which is contrary to the common law, and justifiable only as an exercise of the state's police power, can be retroactively applied to affect vested rights.

Your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons, among others:

(a) The decision of the state court denying the asserted Federal right and depriving the petitioner of its property is without support in the record and is contrary to undisputed testimony in the record.

(b) The decision of the state court denies to petitioner the equal protection of the laws insofar as it distinguishes between a *bona fide* issue of a minority stock interest and a cash payment.

(c) The decision of the state court deprives the petitioner of its property without due process of law because it places harsh and unreasonable restrictions upon freedom of contract and the acquisition and alienation of property.

(d) The decision of the state court deprives the petitioner of its property without due process of law because, as a rule of law justifiable only under the state's police power, it retroactively affects rights which vested before the adoption of the rule.

(e) The case is of great importance to petitioner because of the possibility of it being held liable in other states for obligations or liabilities of the Adams Express Company, American Express Company, Southern Express Company or Wells Fargo & Company.

(f) The case is of great public importance because there have been conflicting decisions by the courts of various states and because of the novelty of the rule adopted by the state court and the far reaching effect which its adoption will have on commercial and corporation law.

WHEREFORE, your petitioner prays that this court will be pleased to grant a writ of certiorari in this case to the Court of Appeals of the State of Kentucky, to bring up this case to this Honorable Court, and for such proceedings therein as to this Honorable Court may seem just.

AMERICAN RAILWAY EXPRESS COMPANY,
By CHARLES W. STOCKTON,
Attorney for Petitioner,
2 Rector Street,
New York.

State of New York,
County of New York,
Southern District of New York—ss.:

FREDERICK P. SMALL, being duly sworn says, he is the Secretary of American Railway Express Company, the petitioner herein; that he has read the foregoing petition and knows its contents; that the same is true to the best of his knowledge and belief; that his knowledge and belief are based upon the record in the case, his general knowledge of the affairs of the company and statements made to him by counsel in the case.

FREDERICK P. SMALL.

Sworn to before me this
25th day of January, 1924.

A. P. ROOS,
Notary Public.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this court.

CHARLES W. STOCKTON,
Attorney for Petitioner.

Motion.

UNITED STATES SUPREME COURT.

In the Matter

of

The Petition of AMERICAN RAILWAY EXPRESS COMPANY,

Petitioner,

—against—

THE COMMONWEALTH OF KENTUCKY,

Respondent,

For a Writ of Certiorari to the Court of Appeals of the State of Kentucky to bring before the Supreme Court the case of COMMONWEALTH OF KENTUCKY,

Plaintiff-Respondent,

—against—

AMERICAN RAILWAY EXPRESS COMPANY,

Defendant-Appellant.

Now comes the petitioner above named by Charles W. Stockton, his attorney, and moves this Court upon a certified copy of the transcript of the record herein and upon the annexed petition verified the 25th day of January, 1924, for a writ of certiorari directed to the Court of Appeals of the State of Kentucky to bring before

this Court the case of American Railway Express Company, defendant-appellant, against the Commonwealth of Kentucky, plaintiff-respondent, recently decided by the Court of Appeals of the State of Kentucky, for such proceedings herein as to the Court may seem just and for such other and further relief in the premises as may be just.

CHARLES W. STOCKTON,
Attorney for Petitioner,
Office and Post Office Address,
2 Rector Street,
Borough of Manhattan,
City of New York.

KENNETH E. STOCKTON, ESQ.,
Of Counsel.

United States Supreme Court.

In the Matter

of

The Petition of AMERICAN RAILWAY EXPRESS COMPANY,

Petitioner,

—against—

THE COMMONWEALTH OF KENTUCKY,

Respondent.

For a Writ of Certiorari to the Court of Appeals of the State of Kentucky to bring before the Supreme Court the case of COMMONWEALTH OF KENTUCKY,

Plaintiff-Respondent,

—against—

AMERICAN RAILWAY EXPRESS COMPANY,

Defendant-Appellant.

BRIEF IN SUPPORT OF APPLICATION FOR A WRIT OF CERTIORARI.

Statement.

This is an application to review by certiorari a judgment of the Court of Appeals of Kentucky affirming a judgment in favor of the plaintiff in an action brought by the Commonwealth of Kentucky against the petitioner *American Railway Express Company.* This action was brought in equity to hold the American Railway Express Company

liable for the amount of a judgment theretofore secured by the Commonwealth of Kentucky against the *Adams Express Company* on which execution had been returned unsatisfied.

This is the second case of this character to come before this Court, the first having been brought up on a writ of error. On motion of the respondent's counsel, this Court dismissed the first case on October 8th, 1923, for lack of jurisdiction, on the ground that the petitioner's only remedy was by a writ of certiorari. The testimony in the previous case is incorporated by stipulation in the present case and additional testimony has been taken to clear up possible deficiencies of proof in the previous record. As no opinion was rendered by the Kentucky Court of Appeals in affirming this judgment, we have set out the opinion rendered in the first case in full in the Appendix, annexed to this brief. This is the only expression of the Kentucky Court of Appeals setting forth its reasons for its decision herein.

The Adams Express Company, hereinafter for convenience referred to as "the Adams", is a joint stock association organized under the common law of the State of New York. Its members or shareholders are unlimitedly liable for the liabilities of the association. It is nothing more or less than a huge general partnership, operating under a firm name (Record, p. 116).

The original claim against the Adams arose in this way. It appears that in 1916 the local agent of the *Adams* at Harlan, Kentucky, is alleged to have failed to keep certain records with reference to incoming shipments of liquor and for this alleged failure a prosecution was commenced prior to June 30, 1918, in the name of the Common-

wealth of Kentucky against the *Adams*, under a penal statute of the State of Kentucky (Record, p. 2). The action remained pending in the Circuit Court of Harlan County, Kentucky, until January, 1921, when it was brought on for trial and judgment was rendered against the Adams for fines amounting in the aggregate to approximately $3,000 (Record, p. 3).

In the meanwhile, on July 1, 1918, the petitioner, American Railway Express Company, a Delaware corporation, purchased from the Adams its operating equipment *in the State of Kentucky*, issuing in exchange its stock of the par value of the property acquired. The value of this equipment was $93,000 and the value of the stock issued to the Adams for the Kentucky property was less than 1 per cent. of the total issued stock of the American Railway Express Company (Record, p. 78). (In order to avoid any misunderstanding, we desire to say, at this point, that it is not disputed that at the same time the petitioner acquired from the Adams property located in other states of the aggregate value of $8,600,000, for which stock was issued to the Adams at par. However, this fact was not relied on by State Court in arriving at its conclusion and it is quite irrelevant to the present issue.)

These are the simple and undisputed facts upon which the decision of the Kentucky Court of Appeals was based and the only issue involved is a question of law.

We think it will be undisputed that the American Railway Express Company never, by express undertaking or by a course of conduct, assumed any of the obligations of the Adams. There is no evidence in the record on which can be

predicated an intentional assumption of liability and it was repeatedly denied by the witnesses competent to testify on this point (Record, pp. 35, 43, 75).

We think also that it will be undisputed that there was never any consolidation or merger of the Adams Express Company into the American Railway Express Company in either a legal or practical sense. The total value of property transferred by the Adams to the American Railway Express Company on July 1, 1918, including that relevant to this action, was approximately $8,600,000 while the total assets of the Adams at that time were approximately $63,000,000 (Record, p. 74). It did not transfer to the petitioner American Railway Express Company its foreign business and money order business. No steps have ever been taken for the dissolution of the Adams and, as a matter of fact, in March, 1922, it resumed active business operations in the City of New York, in the transportation of money and securities (Record, p. 75). It has always had offices in the City of New York at which its executive officers transacted the business of the association. No stock of the American Railway Express Company has been distributed to the stockholders of the Adams. It has conducted the investigation and payment of its own claims with the exception of the brief period between July 1, 1918 and February 1, 1919 (Record, p. 76). None of the officers of the Adams are officers or employees of the American Railway Express Company, and only four of the twelve directors of the American Railway Express Company are in any way connected with the Adams (Record, p. 76). The Adams owns less than a third of the issued

and outstanding stock of the American Railway Express Company. *The opinion of the State Court specifically admits that there was no merger or consolidation* (Appendix, p. 75).

We think also that it will be undisputed that there was no *actual fraud* in the acquisition by the petitioner of the operating equipment of the Adams in the State of Kentucky. The circumstances attending the transfer of the property arose out of the exercise by the Director General of the authority deemed by him necessary for the successful prosecution of the war (Record, pp. 71-74, 33-35).

On December 28, 1917, the President of the United States, acting under the war powers conferred on him by Congress, took over all the railroad lines of the United States and vested control of them in his agent, the Director General of Railroads. The Adams, American, Southern and Wells Fargo Express Companies had been operating over these railroad lines under contract and they immediately made application to the Director General of Railroads to ascertain whether they had been taken over with the railroad lines. They were advised that they had not been taken over and that the Director General would not take them over or allow them to operate on the railroads as separate entities. It was recommended that they organize a new corporation, to operate over the unified railroad system controlled by the Director General, and that said new corporation purchase from them respectively their property used in carrying on their express transportation business in the United States, *but not including cash or treasury assets.*

It was a case of joining in the organization of the American Railway Express Company, or being put off the railroad lines controlled by the Director General. The first alternative meant the acceptance of a situation which the national welfare (at least, as represented by the Director General) required—the other meant going out of the express transportation business, leaving horses and wagons and other operating equipment scattered all over the United States. In such a situation, common sense and patriotism dictated the acceptance of the first alternative. The old express companies, on June 21, 1918, entered into an agreement with the Director General whereby they undertook to organize the American Railway Express Company and to transfer to it all their domestic operating equipment at this fair market, together with some cash for working capital, in exchange for stock of the American Railway Express Company at par. This involved the issue to the Adams Express Company of about $8,600,000 par value of stock of the petitioner, American Railway Express Company, and about $25,000,000 to the other companies. On his part, the Director General of Railroads agreed to execute a contract with the American Railway Express Company, giving it the right to operate over the railroad lines under his control. This contract is set forth in full at page 87 of the Record.

The agreement between the Director General and the old express companies did not provide for the merger or consolidation of the old companies into the new company—in fact, it expressly required them to maintain their corporate existence, and they have done so up to the present day, and have continuously owned and dealt with

assets which were not sold to the American Railway Express Company (Record, p. 43).

These agreements were duly carried out and on July 1, 1918, the Adams transferred to the American Railway Express Company its tangible property used in its express transportation business in the United States, as well as a little less than $1,000,000 in cash, in exchange for which it received approximately $8,600,000 par value of the capital stock of the American Railway Express Company. At the same time approximately $25,000,000 par value of the capital stock of the American Railway Express Company was issued to Wells Fargo & Company, the American Express Company and the Southern Express Company at par in exchange for their domestic operating property and cash working capital paid in by them.

Certainly it cannot be claimed that the *petitioner* was a party to an actual fraud. It was formed at the request and under the direct supervision of the Director General. Not a share of stock was issued for anything except physical property at its fair market value, which represented cost less depreciation. If the American Railway Express Company was a party to an actual fraud, the Director General of the United States and his entire corps of advisers were also parties to the same fraud, for the transaction was planned and carried out not only with their approval but practically at their command. *As a matter of fact, the Court of Appeals of Kentucky finds in its decision that there was no actual fraud* (Appendix, p. 75).

The Court of Appeals of Kentucky did not base its decision upon the ground of merger, express agreement or actual fraud. Its decision hinged

upon two simple facts which are undisputed; (1) that the petitioner, American Railway Express Company, on July 1, 1918, acquired all the property of the Adams in the state of Kentucky; (2) that the petitioner paid for such property by the issuance of stock (Appendix, pp. 75, 76).

Upon these two facts alone the Court of Appeals of Kentucky held (1) that the property of the Adams within the state of Kentucky was impressed with a trust for the benefit of Kentucky creditors; (2) that the American Railway Express Company was guilty of constructive fraud in the purchase of this property in exchange for its own stock and was not a *bona fide* holder for value so as to cut off the rights of general creditors of the Adams to follow this property for satisfaction of their claims.

The petitioner's contention is that the decision of the state court deprives it of its property without due process of law because (1) it proceeds upon a principle of law based on assumptions of fact which are unsupported by the record; (2) it does by judicial decision what would be unconstitutional in a statute of similar effect; (3) the decision is contrary to the established principles of common law, and is an attempt at judicial legislation under the police power of the state which cannot be retroactively applied to affect vested rights.

POINT I.

The basis of fact upon which the Court of Appeals of Kentucky rested its decision, denying the asserted federal right, has no support in the record.

The Kentucky Court assumed (1) that the Adams Express Company distributed among its shareholders the stock received in exchange for the property transferred; (2) that the plaintiff was a creditor of the Adams Express Company at the time it transferred its Kentucky property to the American Railway Express Company on July 1, 1918; and (3) that the Adams Express Company was a corporation.

One cannot read the Court's opinion without realizing that these assumptions were the cornerstones around which it constructed its theory that the American Railway Express Company was liable for the liabilities of the Adams Express Company, and we submit that, as a matter of fact, they were absolutely conclusive of the issue.

Let us first examine the record to see if there is a basis for any of these assumptions. Whatever may have been the deficiencies of the record in the original case, we assert with confidence that, not only is the record in this case bare of any evidence to support such assumptions, but it affirmatively appears that they are contrary to fact.

It appears from the deposition of W. M. Barrett (Record, p. 68) that none of the stock of the American Railway Express Company, issued to

the Adams, has been distributed to the stockholders of the Adams and that it is still in the treasury of the Adams.

It appears from the plaintiff's petition in equity, filed June 2nd, 1921 (Record, p. 1) that the criminal prosecution against the Adams under subsection 3, Section 2569B of the Kentucky Statutes were still pending in the Harlan Circuit Court on June 30, 1918, and that none of these prosecutions came on for trial until January, 1921.

With reference to the third assumption, the state court said, in its opinion concerning the prior case (Appendix, p. 76):

> "We may also here state that under our constitution and statutes, the Adams although a joint stock company organized under the laws of New York is to be treated in this state as a corporation. Whether its stockholders are personally liable for its debts, as in the case of a partnership, we are not able to say as we are not advised concerning the statutes of New York or the articles of association under which it was organized. And so, under these circumstances, we will treat it as a corporation."

However, to rebut any such presumption in the present case, there was introduced in evidence uncontroverted testimony to the effect that the Adams was a joint stock association organized under the common law in the state of New York, the stockholders of which are fully liable for all the obligations of the association (Record, p. 116).

These erroneous assumptions of fact, if material to the decision of the state court, bring the case within the application of the rule that where the

decision of the state court, denying the asserted Federal right, has no support in the record, it is the duty of this court to review and correct this error.

Postal Tel. Cable Co. v. *Newport*, 247 U. S. 464, 473:

> "But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted Federal rights has any support in the record; for if not, it is our duty to review and correct that error."

Southern Pacific v. *Schuyler*, 227 U. S. 611;
N. C. Railway Co. v. *Zachary*, 232 U. S. 248, 259;
Carlson v. *Curtiss*, 234 U. S. 103-106;
Norfolk & Western Railway Co. v. *Conley, Attorney General for the State of West Virginia*, 236 U. S. 605-610;
Interstate Amusement Co. v. *Albert*, 239 U. S. 560-567.

We have, therefore, only to consider whether these unfounded assumptions of fact were the basis upon which the state court rested its decision denying the Federal rights asserted by the petitioner.

With respect to the first, it is sufficient to note that the majority of the decisions cited and analyzed in the court's opinion specifically stressed the fact that in such cases there had been a distribution by the selling corporation of the stock received in exchange for its property and that it had nothing left in its hands against which the claims of creditors might be satisfied. In

most of these cases the purchasing corporation issued its stock directly to the stockholders of the selling corporation and this was held to make it a party to the diversion of the trust fund. It was so necessary to the decision of the Court of Appeals that it felt called upon to assume the fact. Moreover, as a matter of general law, it may be that the fact that the selling corporation has reserved none of the purchase price for the satisfaction of the claims of its creditors, is a "badge of fraud" which will create a presumption of a fraudulent conveyance to defeat the rights of creditors.

With respect to the second assumption, the Court of Appeals of Kentucky wrongfully assumed that the Commonwealth of Kentucky was a creditor of the Adams Express Company on July 1, 1918. Since the decision was admittedly for the protection of the rights of creditors this was an assumption of the very fact upon which judgment was rendered against the petitioner. It should be remembered that the judgments obtained against the Adams Express Company represented fines recovered in prosecutions under a penal statute of the State of Kentucky and *were not recovered until after the transfer of the Adams property.* While these prosecutions were begun prior to July 1, 1918, they had been allowed to lie dormant until 1921, over a year after the transfer to the American Railway Express Company of the Kentucky property of the Adams Express Company. There is no statute of the State of Kentucky making such prosecutions a lien on the property of the accused. Under such circumstances we submit that the Commonwealth of Kentucky was not a creditor of the Adams Express Company on July 1, 1918. Even if the

petitioner had known of the pendency of these actions, *there was a presumption that the Adams Express Company was not guilty until convicted.* A penal action is a criminal prosecution, *L. & N. R. R.* v. *Commonwealth*, 112 Ky. 635, and it is a well settled rule that the doctrine of *lis pendens* does not bind a transferee where the vendor is the subject of a criminal prosecution, *Farly* v. *Wurz*, 217 N. Y. 105.

> "If the judgment of conviction had been rendered while Russ was the holder of the certificate (Liquor Tax Law 15, subd. 8), a different question would be before us. But a judgment rendered on a plea of guilty after the transfer of the certificate is not evidence against the new holder. As against him, the violation of law must be established by independent evidence. The rule that an estoppel binds privies as well as parties 'applies only to a privity arising after the event out of which the estoppel arises' (*Masten* v. *Olcott*, 101 N. Y. 152, 161; *Zoeller* v. *Riley*, 100 N. Y. 102, 109; *Keokuk & W. R. R. Co.* v. *Missouri*, 152 U. S. 301, 314). If the equitable doctrine of *lis pendens* is ever applicable to such certificates (*Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616, 629, 630; *Presido County* v. *Noel-Young Bond & Stock Co.*, 212 U. S. 58, 77), this case is not within it. The criminal prosecution was not a litigation directly affecting the *res* acquired by the purchaser (*Zoeller* v. *Riley, supra; Green* v. *Rick*, 121 Pa. St. 130, 141; *Houston* v. *Timmerman*, 17 Ore. 499, 505)."

With respect to the third assumption, that the Adams Express Company is a corporation, we submit that it involved the very basis upon which

the liability of the American Railway Express Company was predicated. The State Court held that the issuance of stock was not a valuable consideration and that therefore the petitioner stands in the position of a donee of the Adams property in Kentucky. However, if this property is to be followed into the hands of a *donee, there must be a trust fund theory,* arising either out of a fraudulent conveyance or the fact that it involves the assets of a *corporation.* Yet this was admittedly not a fraudulent conveyance and it can only be treated as a trust fund under the theory that it concerns corporate assets. As we have seen, it affirmatively appears from the present record that the Adams Express Company is a joint stock association whose members are unlimitedly liable for its obligations. The statutes of Kentucky which treat it as a corporation, as mentioned in the opinion of the Court of Appeals, are only statutes concerning the manner and basis of taxation. There is no statute of the State of Kentucky which provides for limited liability of the shareholders of the Adams Express Company and such a statute is the only kind which would be relevant to the present issue. If the shareholders of the Adams Express Company were unlimitedly liable for its liabilities in the State of Kentucky—and it affirmatively appears that they were—we submit that its property did not constitute a trust fund for its creditors, so long as it was solvent—that so long as this partnership was solvent it could give its property away, if it so desired, and there would be no liability on the transferee to the creditors of the partnership.

The reason for this distinction is clear upon a moment's analysis. A corporation is a creature of limited liability and the only recourse of its creditors is against its capital stock. It was for this reason that the courts devised the so-called "trust fund" theory applicable to the capital stock of the corporation, holding that the corporation could not dispose of its capital stock except for a valuable consideration to which its creditors might resort as a substitute for the original capital stock of the corporation. The reason was well pointed out by Mr. Justice Swain of this Court in *Sanger* v. *Upton*, 91 U. S. at page 60, when he said:

> "The capital stock of an incorporated company is a fund set apart for the payment of its debts. *It is a substitute for the personal liability which subsists in private copartnerships.* When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security." (Italics ours.)

This case was cited with approval and this excerpt was repeated in full in *County of Morgan* v. *Allen*, 103 U. S. 498, 508, and the doctrine has been continuously reaffirmed by this court and the highest courts of various states down to the present time.

If a corporation transfers all or a substantial part of its capital assets without receiving a valuable consideration therefor it deprives its creditors of the only recourse they have for the payment of their claims. However, so long as an individual or partnership remains solvent the gratuitous transfer of a part of its property does not deprive the creditors of their recourse against the full individual liability of the partners. The transfer by a partnership of all or a part of the firm assets did not give the creditors a right at common law to follow such assets, *unless it left the firm insolvent.* In such a case the transfer became a fraudulent conveyance to defeat the rights of creditors and voidable as such. It is this same principle which applies to a gratuitous transfer of all the property of a corporation. Such a transfer *ipso facto* renders the corporation insolvent and is voidable as to its creditors. However, this presumption of resulting insolvency which it is proper to make in the case of a gratuitous transfer by a corporation because of the corporate attribute of limited liability, cannot be made in the case of a partnership, because in such case the creditors have recourse against the full personal liability of the individual partners. If the present record justified the assumption that the Adams Express Company was left insolvent by the transfer of the Kentucky property or even if it were bare of evidence one way or the other, the assumption of the Kentucky Court might not be erroneous in result although it is in theory. However, it affirmatively appears from the uncontradicted testimony of its Treasurer and President that since July 1, 1918, it has itself paid claims amounting to several million

dollars, and has been solvent at all times, irrespective of the enormous assets owned by its several thousand members, who are each and all individually liable for the association's liabilities. Under these circumstances we maintain that the Adams Express Company could have made an outright gift of the property in Kentucky to any one it saw fit and the donee would take it free and clear of the rights of Kentucky creditors. The assumption by the Kentucky court that the Adams Express Company was a corporation or creature of limited liability was contrary to the facts of the record and absolutely necessary for the remarkable decision arrived at. However, to take the property of the American Railway Express Company under a decision rendered on such an unfounded assumption is a lack of due process and contrary to the Constitution of the United States.

POINT II.

The Court of Appeals of Kentucky has attempted to establish by judicial decision a rule which would be unconstitutional if created by statute.

(a) *The decision denies petitioner the equal protection of laws in so far as it makes a distinction between payment in cash and a bona fide issue of stock.*

The conclusion reached by the Kentucky Court of Appeals was that the issuance of stock in ex-

change for property is not a valuable consideration so far as the creditors of the original owner of the property are concerned but that if the petitioner had paid cash for the property acquired, it would have been a *bona fide* holder for value and the creditors of the Adams could not have followed the property into the petitioner's hands. Such a conclusion requires the assumption that a trust fund theory is applicable to the property transferred so that the creditors can follow the property into the hands of a *bona fide* donee. However, let us assume for the sake of the argument in this point, that the property of a solvent individual or partnership, segregated in a particular State, is a trust fund for the benefit of his or its creditors, and that these creditors can follow this property into the hands of a *bona fide* donee, even if the individual or firm debtor possesses ample property in other States to satisfy all creditor's claims.

Even under such an assumption, to treat a corporation which pays cash for property as a *bona fide* holder for value, and a corporation which issues its own stock (but less than a controlling interest) as a donee, denies to the latter corporation the equal protection of the laws. If there is no reasonable ground for a distinction between the payment of cash and the *bona fide* issuance of stock (but less than a controlling interest) in exchange for property, the distinction made by the Kentucky Court of Appeals was a denial of the equal protection of the laws. We contend that there is no reasonable distinction between the two under the circumstances of the

present case. The circumstances relied on are——

(1) Less than 1/3 of 1% of the total issued stock of the American Railway Express Company was issued to the Adams Express Company for the property in Kentucky.

(2) 75% of the total amount of stock issued was issued for property equivalent to the full par value, acquired from firms having no connection with the Adams Express Company.

(3) At no time before or after the transfer did the Adams Express Company or the persons controlling it, also control the American Railway Express Company.

(4) There was admittedly no fraudulent intent on the part of any person or corporation to defeat the rights of creditors of the Adams Express Company.

The Court of Appeals practically took the position that the issue of stock by a corporation in exchange for property is a "badge of fraud." While it cited some cases in support of this proposition, it did not reach this conclusion by an analysis of the principles upon which the cases were decided, but rather by examining the facts common to all such cases and seizing upon the common fact of the issuance of stock as the underlying principle of decision. There is perhaps no more prolific source of judicial and scientific error than the so-called selective method of attempting to discover the cause which produces a given effect. Having diagnosed the decisions cited as based on the fact of the issue of stock the Court then proceeded to cast about for additional

grounds to bolster up and justify the diagnosis. It is well worth while to stop to examine into the validity of these grounds, because they are mentioned in one or two of the cases cited in the opinion of the State Court.

One of these was that the creditors of the seller should not be compelled to look to the stock acquired by their debtor for the satisfaction of their claims, because it would be hard to realize on. However, there is no proof that the stock of the American Railway Express Company did not have an easily ascertained market value. Let us suppose that the consideration for the purchase by the American Railway Express Company had been the delivery to the Adams Express Company of full paid U. S. Steel Co. stock. Could it be contended that this would not have been a valuable consideration? The same objection would be applicable if the petitioner had exchanged real property located in the State of New York for the Kentucky property of the Adams, yet can it be doubted that such a consideration would be a valuable one?

Then the Kentucky Court asserted that it would not compel its residents to look outside the State for the satisfaction of their claims against the Adams Express Company. But such an argument would apply with equal validity to a case where the American Railway Express Company paid for the property acquired in cash which was delivered and retained in New York. Yet the Kentucky Court admits that if the payment had been made in cash the American Railway Express Company would take the property free and clear of the claims of all creditors in Kentucky.

Neither of these grounds applies with any greater force to the case of a stock issue than they do to a cash payment, and it is clear that we must examine the reasoning of the cases cited by the Kentucky Court to test the validity of its conclusion.

We submit that all the cases cited by the Kentucky Court and all the other cases ever decided on the same point have one fact in common, in addition to the mere fact of a stock issue; *i. e., that the purchasing corporation was controlled after the sale by practically the same persons who had controlled the seller.*

It is this fact of practical and actual identity between seller and buyer that has caused the courts in such cases to disregard the sale where the rights of creditors were concerned. Such sales were not *bona fide* because the new corporation was merely the debtor under another guise. In all of the cases cited in the State Court's opinion the stockholders of the selling corporation were practically identical with those of the buying erporation. In most of these cases the stock of the purchasing corporation was distributed directly among the stockholders of the selling corporation. In most of them the transaction is designated as practically a consolidation or merger, which is only another manner of saying that there is identity of control.

The decisions of this Court are very instructive on this point. In *Linn Timber Co.* v. *U. S.*, 236 U. S. 574, land was conveyed to a corporation in exchange for practically all its capital stock and the Government thereafter brought suit to avoid

the title on the ground that the vendor's title was fraudulently obtained. One might have expected this Court, if the rule laid down by the Kentucky Court of Appeals, is sound, to set aside the transfer to the company on the simple ground that the issuance of its stock was not a valuable consideration. However, not a word was said to this effect and no intimation given that the Court so thought. The decision was based on the fact that the corporation was but the *alter ego* of the transferror—that they were identical.

On the same ground the transfer was set aside in *McCaskill Co.* v. *U. S.*, 216 U. S. 504 and in *Wilson Coal Co.* v. *U. S.*, 188 Fed. 545. In neither of these cases was there an intimation that the stock issued was not a valuable consideration. In both of them it was the fact of identity between transferror and the transferee that caused the property to be followed into the corporation's hands. An analysis of these opinions clearly indicates that if there had been no identity between the transferror and transferee the corporation's title to the property would have been unassailable.

A simple illustration will serve to test the validity of the proposition that the issuance of stock is not a valuable consideration for the transfer of property. Let us assume that an individual holds certain personal property subject to a secret trust and that he subscribes for capital stock of a newly organized corporation of the par value of the property held in trust. It is assumed that the stock interest so acquired by the trustee is less than a controlling interest in the stock of the corporation, in fact less than 1%, and that the remainder of the capital stock of the corporation

is issued to other persons for cash or property equal to the par value of such stock. Under such circumstances could the beneficiary of the secret trust follow the property into the hands of the corporation? We submit that it could not, that the corporation would in such case be a *bona fide* holder for value, and that at most the beneficiary of the secret trust could only treat the stock acquired by the trustee as a substitute for the original trust property. It may be urged that this illustration is not in point because in the present case the Kentucky court held that the petitioner *should have known* that there were probably unpaid creditors of the Adams, while the illustration concerns a case where the purchasing corporation could not have known that the property constituted a trust fund. However, this distinction does not affect the question of what constitutes a valuable consideration—it bears on the question as to when a transferee is a *bona fide* holder. If the transferee takes from the trustee with notice of the trust, it does not matter how valuable is the consideration paid—the transfer can be avoided at the instance of the beneficiary. For this reason a transfer to a corporation in exchange for a controlling interest in its stock would be voidable, not because the consideration was the issuance of stock, but because the transferee and the transferror are in fact identical.

The true reason for holding that a corporation, which acquires all the assets of another corporation in exchange for the stock of the new corporation, is not a *bona fide* purchaser for value, is not, as some courts have said, because the stock is not a valuable consideration, but because the new corporation is not a *bona fide* purchaser.

Where there is no legal or practical identity between seller and buyer, the buyer must be regarded as a *bona fide* purchaser in the absence of actual fraud. The fact that a stock issue is present in all the cases holding the purchasing corporation liable is due to the fact that this is the only method of control in the case of a corporation. To say that the American Railway Express Company did not give a valuable consideration to the Adams Express Company when it issued its stock is contrary to both common law and common sense. Without regard to the value of the Kentucky property acquired by the American Railway Express Company from the Adams, this stock had a book value of at least $99.60 per share on account of property transferred to the American Railway Express Company, other than that belonging to the Adams in Kentucky. In addition to this book value this stock represented a proportionate interest in the franchise and goodwill which must be deemed to be of very considerable value, because the company had the exclusive right to do an express business over practically all the railroad lines of the United States.

The Kentucky court admits that in the present case the property of the Adams could not have been followed if it had been paid for in cash, and thereby it admits what is the actual fact, that there is no such identity between the petitioner, American Railway Express Company, and the Adams as to put the petitioner in the position of a purchaser with notice. *If the Kentucky court had found that the Adams and the petitioner were identical* or if it had held that the transfer of the property was voidable as to creditors, as a diversion of a trust fund, whether it was paid

for in cash or stock, we could not assail it as discriminatory and a denial to petitioner of equal protection of the laws. However, when it laid down the rule that the transfer would be immune from attack if the consideration were cash, but subject to attack, if it were stock, we submit that since there is no reasonable ground for a distinction between the two under the facts of the present case, there is a discrimination against the petitioner and a denial of the equal protection of the laws. Could a decision of a state court, in effect setting aside a transfer to a corporation on the ground that it was paid for in $10 bills be supported if it were announced that the transfer would have been proper if paid for in $1 bills? Yet no more valid distinction in principle can be pointed out between payment in cash or property and issuance of stock (unaccompanied by a controlling interest).

Moreover, it is apparent that the decision of the state court denies to petitioners the equal protection of the laws in so far as it distinguishes between a purchase by a corporation and a purchase by an individual. For instance, if John Jones, owning $10,000 par value of American Railway Express Company stock, had delivered it to the Adams Express Company in exchange for its Kentucky property, it does not appear under the decision of the Kentucky court, that the transaction would have been subject to attack by the Kentucky creditors of the Adams Express Company. But, if the American Railway Express Company issues this amount of stock to the Adams Express Company for the same property, it renders itself liable to the Adams Express Company creditors. Such a distinction has no support in

either reason or law. It only illustrates in another form the discriminatory effect and actual injustice of the Kentucky court's decision.

If the rule announced by the Kentucky Court of Appeals would have been unconstitutional as a statute, it seems clear that this court can review it if its effect is to deny to petitioner the equal protection of the laws or deprive him of property without due process of law.

Prudential Ins. Co. v. *Cheek*, 259 U. S. 529;

> "It seems to us clear that the State might without conflict with the 14th Amendment, enact through its legislative department a statute precisely to the same effect as the rule of law and public policy declared by its court of last resort. And, for the purposes of our jurisdiction, it makes no difference under the Amendment, through what department the state has acted. The decision is as valid as a statute would be. No question of 'equal protection' is raised here."

(b) *The decision deprives petitioner of its property without due process of law by imposing a harsh and unreasonable restriction on the acquisition of property.*

For the purpose of argument under this point we shall assume the validity of principle to which we referred in the preceding paragraphs, *i. e.*, that the *bona fide* issue of stock by a corporation in exchange for property is as much a valuable consideration as the payment of cash or property.

The question is then whether a state can enact a rule that where a corporation purchases prop-

erty, which happens to be all the property belonging to the seller in a particular state, this corporation is liable to the seller's creditors in that state.

Such a rule is on its face a drastic one, but it is the effect of the Kentucky Court's decision, if we do not discriminate between a *bona fide* stock issue and a cash payment. As a matter of fact, unless there is a reasonable basis for distinction the rule must be deemed to apply to individual purchasers as well as corporations. The real question for decision is, therefore, whether a sale of all the assets within a particular state of a solvent partnership can be made void as to creditors of the partnership, either by statute or judicial decision.

There are no cases directly in point because up to the present case, no state had attempted to create such a rule of law. This in itself is some support for the conclusion that it is a harsh and unreasonable rule. However, considerable light on the principles involved can be obtained by an examination of the decisions of this Court with reference to the constitutionality of the "Bulk Sales Laws" enacted by many states.

These laws apply to circumstances which have some elements in common with the present case. They apply to instances where the vendor is disposing of an entire stock in trade, presumably the only assets in the state to which his creditors can look for satisfaction of their claims, and the purchaser may be in actual fact a *bona fide* purchaser for value. In these respects they resemble the present case. However, all such laws provide a method by which the purchaser can take a good title to the goods. In some the re-

quirement is the filing of a statement with the town clerk, in others it involves a demand for a list of creditors and mailing of notices to them. When these formalities are complied with the purchaser can take the goods free of any claims of the seller's creditors. However, the rule in the present case provides no method by which the purchasing corporation can acquire a clear title to the property transferred.

These "Bulk Sales Laws" spring from the same commendable desire to protect the rights of creditors which underlies the decision of the Court in this case. We have no quarrel with the motive which creates such statutes or decisions but even a commendable motive cannot justify a wrong action. There are other rights beside those of creditors and the rights of an innocent purchaser for value rank at least as high, if not higher, than those of the vendor's creditors. Such rights may be qualified, *within reason*, as has been done in the "Bulk Sales Acts," but we do not believe they can be wiped out altogether. The state may prescribe regulations to be complied with in the transfer of all the property of a vendor, such as notices to creditors, filing of inventories, etc., but no state has hitherto gone so far as to hold that all transfers of all the property of the vendor are void as to his creditors irrespective of the transferor's solvency. This court has upheld "Bulk Sales Acts" which provided for reasonable formalities in connection with the transfer of a vendor's property in bulk but its opinions have clearly indicated that there could be such a thing as an unreasonable restriction. The decisions have held the statutes in question to be within the reasonable exercise of the police power of the

state rather than a matter absolutely within the state's control, over the exercise of which this court had no power of supervision.

In the case of *Lemieux* v. *Young, Trustee*, 211 U. S. 489, in holding the Connecticut Bulk Sales Law constitutional, this Court said:

> "As the subject to which the statute relates was clearly within the police powers of the State, the statute cannot be held to be repugnant to the due process clause of the Fourteenth Amendment, because of the nature or character of the regulations which the statute embodies, unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. *Booth* v. *Illinois*, 184 U. S. 425. This, we think, is clearly not the case. So, also, as the statute makes a classification based upon a reasonable distinction, and one which, as we have seen, has been generally applied in the exertion of the police power over the subject, there is no foundation for the proposition that the result of the enforcement of the statute will be to deny the equal protection or the laws."

In the case of *Kidd, Dater & Price Co.* v. *Musselman Grocer Co.*, 217 U. S. 472, this Court quoted the excerpt set out above, saying:

> "These principles are decisive against the contentions made in this case, as we do not find in the provisions of the Michigan statute when compared with the Connecticut statute such differences as would warrant us in holding that the regulations of the Michigan statute are so beyond all reasonable relation to the subject to

which they are applied as to amount to mere arbitrary usurpation of power. The purpose of both statutes is the same, viz., to prevent the *de*frauding of creditors by the secret sale of substantially all of a merchant's stock of goods in bulk, and both require notice of such sale and make void as to crediters a sale without notice. The difference between the two statutes are pointed out by counsel in a summary which we excerpt in the margin.

It is apparent, we think, from this summary that the statutes are alike fundamentally, and differ only in minor and incidental provisions. In some respects the Michigan law is more comprehensive than the Connecticut law, as the latter law was limited to retail merchants, while the Michigan law affects wholesalers as well as retailers. The requirements of the Michigan law, that a full and detailed inventory shall be made, does not seem to us to be oppressive and arbitrary, as in *bona fide* purchasers of stocks of goods in bulk a careful purchaser is solicitous to demand such an inventory, and in the purchase in question an inventory was in fact made. Nor can we say, in view of the ruling in the *Lemieux* case, to the effect that a State may without violating the Constitution of the United States, require that creditors be constructively notified of the proposed sale of a stock of goods in bulk, that a requirement for what is in effect actual notice to each creditor is so unreasonable as to be a mere arbitrary exertion of power beyond the authority of the legislature to exert. We do not deem it necessary to further pursue the subject, as we think it clearly results, from the ruling in *Lemieux* v. *Young*, that the Michigan statute in no way offends against the Constitution of the United States, and therefore that the Court below was right."

As we have seen, the rule laid down in the present case provides for no method for validating the sale. No way is suggested in which the American Railway Express Company could have acquired a good title as against creditors of the Adams, so long as it was stock issued in exchange for the property. The Court does not intimate that it would have altered the situation if the American Railway Express Company had taken a list of the Adams creditors or given notice of the sale to all of them. There is no suggestion on the record that the transaction could have been prevented by the creditors if they had been so informed. Certainly the present plaintiff, as the prosecutor of a pending penal action would have had no grounds for interference. It was admittedly a fair sale, in which the best possible price for the property was obtained. It left the Adams with more to pay its debts than it would have had if the property had been disposed of piece by piece wherever it happened to be located. Without entering into a discussion of the merits of the plaintiff's claim, it is safe to say that it is not the fault of the petitioner that the Adams has declined to pay some of its alleged creditors.

We submit, therefore, that an attempt on the part of the state to enact by statute the rule that wherever a solvent individual, partnership or corporation sells all of its property located in a particular state to an individual or corporation, the buyer, *ipso facto*, takes such property subject to the claims of the seller's creditors in that state, is so arbitrary and unjust an exercise of the sovereign power of the state as to be a lack of due process of law. This is clearly so in the

present case where the purchaser gave full value for the property acquired, the seller remained perfectly solvent and its creditors had their remedy by resort to the debtor's property located in other states—in other words, for the convenience of Kentucky creditors there is arbitrarily imposed upon a *bona fide* purchaser for value liability to Kentucky creditors of the vendor.

POINT III.

Even if the State Legislature could properly enact such a statute, the decision of the State Court is not based upon the principles of common law, but is an attempt at judicial legislation under the police powers of the State, which cannot be applied retroactively to affect vested rights.

(a) *This Court is not bound by the decision of the State Court as to the rules of common law applicable to the present case.*

It should be noted that the decision of the State Court is not based on any statute or constitutional provision of the State of Kentucky and no statutes are cited in its support. Presumably, therefore, it must depend for support upon the principles of common law. However, in the present case, there is no peculiar reason for this Court to defer to the decision of the Kentucky Court as to the common law. It is the duty of the Federal courts to de-

termine for themselves questions of commercial law, of general jurisprudence and of rights under the Constitution of the United States.

Swift v. *Tyson*, 16 Pet. 1;
Carpenter Prov. Ins. Co., 16 Pet. 495;
Mutual L. Ins. Co. v. *Lane*, 151 Fed. 280, 281, 157 Fed. 1002;
H. Scherer & Co. v. *Everest*, 168 Fed. 822, 832;
Johnson v. *Charles D. Norton Co.*, 159 Fed. 361;
Guernsey v. *Imperial Bank*, 188 Fed. 300-302;
Independent School Dist. v. *Rew*, 111 Fed. 11, and cases cited;
Oates v. *First Nat. Bank*, 100 U. S. 246;
Cudahy Packing Co. v. *State Nat. Bank*, 134 Fed. 538;
First Nat. Bank v. *Liewer*, 187 Fed. 16.

Even if the decision of the Kentucky Court were to be held to have created a fixed rule of property in the State of Kentucky, the decision was made after the rights of the parties had accrued and is not controlling on the Federal courts. It is their duty to exercise their independent judgment as to what the common law is.

Great Southern Fire Proof Hotel Co. v. *Jones*, 193 U. S. 532;
Shaw v. *Cleveland, C. C. & St. L. R. Co.*, 173 Fed. 750;

Brewer-Elliott Oil & Gas Co. v. *United States*, 270 Fed. 104;
Babbitt v. *Read*, 236 Fed. 49;
United States ex rel. Pierce v. *Cargill*, 263 Fed. 857;
Newbern v. *National Bank*, 234 Fed. 209.

To make the decisions of the State Court obligatory on the Federal courts, the right must have accrued after the rule has been established.

Shaw v. *Cleveland C. C. & St. L. R. Co.*, 173 Fed. 746;
Adelbert College v. *Wabash R. Co.*, 171 Fed. 813;
Jones v. *Great Southern Fireproof Hotel Co.*, 193 U. S. 532;
Kuhn v. *Fairmont Coal Co.*, 215 U. S. 349;
Hartford County v. *Tome*, 153 Fed. 81;
Fleischmann Co. v. *Murray*, 161 Fed. 162;
Murray v. *Wilson Distilling Co.*, 213 U. S. 151.

In the present case the rule of law established by the Court of Appeals of Kentucky was new, not only to the State of Kentucky, but to the previously enunciated principles of the common law. The rule had previously been established in Kentucky, where a corporation transferred *all its property* to another corporation in exchange for stock of the new corporation and after such transfer the new corporation was controlled by the persons who had controlled the old corpora-

tion, or the stock received was distributed among the stockholders of the old corporation, that the new corporation was liable for the debts of the old, at least to the extent of the property acquired. However, the rule established in the present case extends the imposition of liability to an extent never previously dreamed of. In this case the vendor was a joint stock association whose members are unlimitedly liable for its obligations, the property transferred in Kentucky was less than 1% and all the property transferred was less than 20 per cent. of the total assets of the association; the business transferred was only one branch of that conducted by the association; the stock interest acquired in the new corporation was less than one-third of the issued stock; the persons in control of the association did not control the new corporation; there was no dissolution of the association and the stock received was not distributed among its members; the association thereafter remained in existence and engaged in another line of business for profit.

The old rule laid down by the Kentucky courts held that all the capital assets of a corporation were a trust fund for the benefit of creditors. The new rule asserts that that portion of the assets of a joint stock association located within the State of Kentucky, is, as such, a trust fund for the benefit of Kentucky creditors of the association.

The old rule was applied because of identity of control or the fact of dissolution of the old corporation or the distribution of the proceeds. The new rule holds that it is immaterial whether or not there is identity of control or the vendor

remains in business, or whether or not the proceeds of the sale are distributed among the shareholders of the vendor. The only material thing in the view of the new rule is that it is *stock* of the new corporation which is issued in exchange for the property transferred. Whether or not the new rule is the logical extension of the old one, it is still clear that *it is a new rule.* No one could have known under the old rule that the present transaction would have made the American Railway Express Company liable for the obligations of the Adams. Can it be said that the new rule is self-evidently included in the old one, when the Supreme Court of North Carolina has held on a similar record that the old rule does not apply to this case? *McAllister* v. *American Railway Express Co.,* 103 S. E. 129. Even if it can be held to be a rule of property, the rule laid down by the Kentucky Court is a new one, it was rendered after rights had vested in the present case and therefore is not controlling on this Court, which can determine for itself whether or not the decision is justifiable under the well established principles of the Common Law.

(b) *The decision of the State Court cannot be justified under the principles of common law.*

The general rule is that a corporation which purchases all the property of another corporation is not *ipso facto* liable for the debts of the letter.

Postal Telegraph Co. v. *Newport,* 247 U. S. 464;

Gray v. *National Steamship Co.,* 115 U. S. 116;

Racine, etc. Co. v. *Confectioners' Mfg. Co.*, 234 Fed. 876;
Koch v. *Speedwell*, 140 Pac. 598 (Cal.);
Buckler v. *United States, etc. Co.*, 112 Atl. 632 (Pa.);
Hageman v. *Southern R. R. Co.*, 202 Mo. 249;
McAllister v. *American Ry. Express Co.*, 103 S. E. 129 (N. C.);
Swing v. *Empire Lumber Co.*, 105 Minn. 356;
Fogg v. *Blair*, 133 U. S. 534, 541;
Cook on Corporations, 8th Ed. Vol. III, Sec. 673;
Chase v. *Michigan*, 121 Mich. 631;
Austin Co. v. *Smith*, 138 Ga. 651;
Houston v. *Nicolini*, 96 S. W. 84 (Tex.).

Some states have held that there is an exception to this general rule where a corporation transfers *all its property* to another corporation in exchange for *a controlling interest in the stock* of the new corporation and the selling corporation is dissolved or goes out of business. Such were the facts in the cases cited in the opinion of the Kentucky Court of Appeals. The validity of this exception is disputed by very reputable authority:

Hageman v. *Southern Ry.*, 202 Mo. 249;
Swing v. *Empire Lumber Co.*, 105 Minn. 356;
Anderson v. *War*, 8 Idaho, 789;

Ozan L. Co. v. *Davis, etc., Co.*, 284 Fed. 161;
Colorado Springs Co. v. *Albrecht*, 123 Pac. 957;
McAllister v. *Am. Ry. Ex. Co.*, 103 S. E. 129 (N. C.);
Cooper v. *Utah Ry. Co.*, 35 Utah 570;
Homestead Mining Co. v. *Reynolds*, 30 Colorado 330;
Lamkin v. *Baldwin*, 72 Conn. 57.

However, we submit that prior to the decision of this case no court has ever held that the sale of a *small portion of the total assets* of a corporation, which happened to be all the assets of that corporation within a particular state, in exchange for a *minority interest* in the stock of another corporation, makes the purchaser liable to the seller's creditors in that state. Yet such is the abstract principle of law laid down by the Kentucky Court. Such, we say, is the *abstract principle,* because, as applied to the actual facts of the present case, the rule laid down, in effect, was this—that where a corporation purchases from an *admittedly solvent partnership*, having property scattered throughout the United States such portion of its property as happened to be located within the State of Kentucky, issuing in exchange therefor approximately 1/3 of 1% of its issued capital stock, the corporation is liable to the State of Kentucky for the penal liabilities of the partnership to the extent of the property acquired, although there may be no actual identity of any kind between the partnership and corporation. There is very considerable authority for the proposition that even where an *insolvent* partnership turns *all* its assets over to

a corporation for a *controlling* interest in the stock of the corporation and goes out of business the partnership creditors cannot set aside the transfer, although they may go against the stock acquired.

Plaut v. *Billings Drew Co.*, 127 Mich. 11;
Re. Braus, 248 Fed. 55;
Shumaker v. *Davidson*, 116 Iowa, 569;
Harnan v. *Haight*, 177 N. W. 281 (Mich.);
Fisher v. *Campbell*, 101 Fed. 156;
Troy v. *Morse*, 22 Wash. 280;
Gardiner v. *Haines*, 19 S. D. 514;
Haring v. *Hamilton*, 107 Wis. 112;
Scripps v. *Crawford*, 123 Mich. 172;
Evans v. *Johnson*, 149 Fed. 978.

However, in the present case the partnership is admittedly *solvent*, the assets in the State of Kentucky were only a small portion of the entire assets of the Adams, *no controlling interest was acquired* in the stock of the American Railway Express Company and the Adams remained in existence and is still engaged in business (Record, p. 75). The decision of the Kentucky Court was not necessary to preserve the rights of Adams creditors who had exhausted every other remedy in an effort to collect, but merely *for the convenience of Kentucky creditors.* There must have been countless instances where local creditors would have preferred for their own convenience to satisfy their claims against a non-resident debtor out of property formerly belonging to it, but we have been unable to find a single case that laid down the remarkable rule of this case. The

decision is clearly contrary to the fundamental common law and if justifiable at all, must be based upon the right of a state to enact special laws for the protection of its own citizens.

(c) *The decision of the State Court is an attempt at judicial legislation under the State's police power.*

As we have said before, the decision of the Court of Appeals was not necessary to preserve to a creditor a right of recourse, without which he would have been absolutely unable to get satisfaction of his claim. It is not disputed that service could be obtained against the Adams in other jurisdictions than Kentucky or that the Adams was perfectly solvent and able to meet all claims against it. The decision was rendered for the convenience of Kentucky creditors.

It seems clear that the Kentucky Court was actually attempting a piece of judicial legislation on the theory that it was a permissible exercise of the State's police power. It is true that at common law all the capital assets of a corporation constituted a trust fund for the benefit of all the creditors of the corporation, but there was no basis at common law for segregating the assets within a particular state and treating them as a trust fund for the benefit of creditors residing in that state. Yet this is the precise rule announced by the Court of Appeals of Kentucky, and it gives rise to some interesting questions. If it is permissible for a state court of general jurisdiction to treat firm assets within the State as a trust fund for resident creditors, could a local court whose jurisdiction is limited to a municipality, treat such assets within the muni-

cipality as a trust fund for the benefit of creditors residing within that municipality? It seems a far stretch to justify such decisions under the common law, irrespective of how justifiable they might be as statutes enacted for the protection of the State's residents.

It seems to us debatable as to whether or not the courts of a State can take into their own hands the enactment of rules deemed to be within the proper limits of the State's police power and we are inclined to believe that the decision of a court must rest either upon the general principles of common law or upon specific statutes of the State or Federal Government. In other words, the decision of a State court cannot be justified as within the police power of the State when it is admittedly contrary to the principles of the common law, and is not rendered under a State statute enacted under the State's police power. A rather exhaustive search has failed to disclose any decision of a State court which is supported upon this ground.

For instance, could a State court, without any action on the part of the State legislature, announce the rule that foreign corporations could not sue on contracts made within the State unless they had complied with the technical requirements necessary to domicile them in the State? Could a State court hold that an employe, injured in the performance of his duties, was entitled to compensation, irrespective of whether or not there was any negligence on the part of the employer, in the absence of a legislative enactment of a Workmen's Compensation Law? Could a State court in the absence of a legislative enactment of a Bulk Sales Law hold that the sale of

an entire stock of merchandise to a *bona fide* purchaser for value was void as to the seller's creditors, unless certain specified technicalities were complied with? At the most, such clear cases of judicial legislation would be of doubtful validity.

(d) *A statute or rule of judicial decision based only on the State's police power cannot retroactively affect vested rights acquired before the enactment of the rule.*

For the purpose of argument under this point, it is quite immaterial whether or not the State of Kentucky could *in the exercise of its police power* adopt a rule of law either by judicial decision or statute of the same general purport as the decision sought to be reviewed. If it could not do so, no further argument is necessary to show that the decision is unconstitutional. If it could do so, the rule adopted could not be classed as a part of the common law, but would be an exercise of the sovereign power of the State for the benefit of its citizens.

Even if it be assumed that the Kentucky Court can enact rules of law under the police power it seems clear that such rules will be subject to the same limitations as a statute of similar purport. A state cannot accomplish by judicial decision what it could not accomplish by legislative enactment. One of the principal limitations on the police power is that which prevents the destruction of vested property rights. Let us assume for the sake of argument under this point that at common law the American Railway Express Company would not have been liable for the obligations of the Adams Express Company under the facts of this case—that at common law it would acquire the property of the Adams Express Com-

pany free and clear of the claims of any creditors of the Adams Express Company. Then let us assume that on December 10, 1920, the legislature of Kentucky had passed a statute providing that under such circumstances the purchasing corporation should acquire the property subject to a lien in favor of the creditors of the vendor, and that it had been attempted to apply this statute to the acquisition by the American Railway Express Company of the Adams property on July 1, 1918, Can it be doubted that under such circumstances it would be held that the American Railway Express Company had a vested right in the property acquired from the Adams Express Company which the subsequent statute could not constitutionally impair? It is difficult to see how one could have a stronger case of a vested right of property, which this Court has repeatedly held cannot be impaired by subsequent legislation, even under the admitted police power of the State.

Let us suppose that a State were to enact a "Bulk Sales Law" requiring the purchaser to go through certain formalities in order to take the property free from the claims of the seller's creditors. Could this law be retroactively applied to make void sales effected prior to the passage of the Act? Yet, that is precisely the effect of the Kentucky courts' decision.

The amendment of February 17, 1922 to Section 237 of the Judicial Code clearly indicates that a change in a rule of law established in a State by judicial decision may violate the constitutional rights of a party.

> "In any suit involving the validity of a contract wherein it is claimed that a

> change in the rule of law, or construction of Statutes by the highest court of a State would be repugnant to the Constitution of the United States, the Supreme Court shall upon writ of error remand, reverse, or affirm the judgment of the State Court, if such claim is set up in the case before the final judgment is entered in the State Court and the decision is *against* the claim so made."

While this amendment, *permitting a writ of error* to this Court, applies only to cases involving the validity of a contract, it recognizes the fact that rights may become vested under one rule of law as laid down by the highest courts of a State and that a change in such a rule of law may be repugnant to the federal constitution. It is true that the present case does not directly involve the validity of a contract, and so resort to this Court cannot be had upon a writ of error, but it does involve the destruction of vested rights due to a change in the rule of law by the highest court of Kentucky and as such this Court may review it on a writ of certiorari.

POINT IV.

Importance of issue involved.

(a) *Importance to the Petitioner.*

The issue involved in this case is of vital importance to the petitioner. As we have seen, the petitioner acquired the domestic express operating property of the Wells Fargo, Southern and American express companies, as well as that of

the Adams. These companies had outstanding on July 1, 1918, a large volume of claims for loss and damage, personal injuries, breach of contract, and other forms of liability. If the petitioner may be held liable for these claims it is faced with the possibility of large losses in the future, for which it is in no way responsible.

It is true that the highest Court of North Carolina has held that the petitioner did not assume the liabilities of the Southern Express Company, *McAlister* v. *American Railway Express Co., supra;* an intermediate appellate court of Ohio has held that petitioner did not assume the liabilities of Wells Fargo & Co., *Sebring Tire & Rubber Co.* v. *American Railway Express Co. and Wells Fargo & Co.,* No. 587, in Ohio Court of Appeals, Oct., 1921; and the United States District Court for the Eastern District of Virginia has held that the petitioner is not liable for personal injury claims against the Southern Express Company. *Houseman* v. *American Railway Express Co. and Southern Express Co.* (complaint dismissed Oct. 26, 1923). However, there is a large amount of claims still outstanding against the Adams, Southern and Wells Fargo Companies, in which an attempt may be made to recover against the petitioner under the decision in the present case, and such a result would be most unjust, and would work a great hardship on the petitioner.

In Virginia and South Carolina the petitioner has been held liable for liabilities of the Southern Express Company. In Iowa the petitioner has been held liable for liabilities of the Adams. In Texas, an intermediate State court has held

petitioner liable for a $50,000 default judgment against Wells Fargo & Company, in favor of a *non-resident* of Texas for personal injuries received in Arizona, and the case is now upon appeal to the Supreme Court of Texas.

(b) *Importance to Public.*

The issue involved in this case is of vital importance to the public at large. It represents not a mere extension of existing principles of law, but the inauguration of a new theory of liability. If the rule announced in the present case is not unconstitutional, it means that sooner or later a new rule of law will have to be adopted either by the courts or legislatures of practically every State as a defensive measure. If one State may single out all the property of a business concern and make it a trust fund for the benefit of resident creditors, other States must adopt a similar rule in order to protect their own citizens. If Kentucky makes the Kentucky property of the Adams, or the Standard Oil Company or any other large concern, a trust fund which Kentucky creditors can follow into the hands of *bona fide* purchasers for value, but New York creditors cannot, it behooves the New York courts or legislature to adopt such a rule for the protection of its own citizens with reference to New York property. The consequence will be that no one will ever know whether the property he buys is a liability, or an asset. If it turns out to have been all the property in a particular State, belonging to the vendor, the purchaser is liable to the creditors of the vendor. It does not matter that he pays value, it does not matter that there was no

suspicion of a fraudulent intent, it does not matter how solvent the seller may remain, so long as it appears that it results in the practical inconvenience to the vendor's creditors of having to go to another State to enforce their claims against the vendor. We think it is unnecessary to go into further detail to show the broad and drastic application of which the rule is susceptible and the probabilities of its extensive adoption, either judicially or by statute. We submit that it is so harsh and unfair as to be merely an arbitrary exercise of power and that it results in preferences and discriminations which are based on no reasonable classifications, so that it is unconstitutional, both as a deprivation of property without due process of law and as a denial of the equal protection of the laws.

POINT V.

A writ of certiorari should be issued to the Court of Appeals of Kentucky directing that the record of this case be sent up to this Court for review and for such action as it may deem proper.

CHARLES W. STOCKTON,
Attorney for Petitioner.

KENNETH E. STOCKTON,
Of Counsel.

Appendix.

COURT OF APPEALS OF KENTUCKY

December 10, 1920

AMERICAN RAILWAY EXPRESS COMPANY,
Appellant,

—against—

COMMONWELTH OF KENTUCKY,
Appellee.

Appeal from Harlan Circuit Court.

Opinion of the Court by Chief Justice Carroll, Affirming:

The purpose of this suit which was brought in July, 1919, by the Commonwealth of Kentucky was to make the American Railway Express Company liable for certain judgments amounting in round numbers to $4,000 obtained by the Commonwealth against The Adams Express Company in the Harlan Circuit Court. The lower Court gave judgment for the amount asked against the American Railway Express Company and to have a reversal of that judgment it prosecutes this appeal.

There is no question made in the record or in the briefs of counsel for the American company as it will be called, as to the regularity of the proceedings in which the judgments were rendered against the Adams company or as to the

validity of the judgments against it. The reversal is asked upon the sole ground that under the facts and circumstances of the case, the American Company should not be made liable for the payment of the judgments against the Adams company.

Nor is there any disputed issue of fact appearing in the record and this being so the correctness of the judgment appealed from must depend on the principles of law applicable to the case. Before, however, coming to consider the questions of law it will be necessary to set forth the material parts of the pleadings in the case as well as so much of the evidence as shows the circumstances under which the American company acquired the business and property of the Adams company.

The suit was brought by the Commonwealth against the Adams company and the American company and after setting up the judgments against the Adams company and the fact that executions issued on the judgments had been returned by the officer in whose hands they had been placed, "no property found." It was further averred that about June 25, 1918, the defendant American company was organized for the express purpose of taking over and becoming the owner of all the property and rights of the Adams company and other express companies doing a railroad express company business in the United States; that the Adams company on that date transferred and turned over all of its property of every kind, character and description in Kentucky and the United States to the American company and received as the only consideration therefor capital stock of the American company of the par value of $8,000,000; that the Adams company in

this transfer and sale delivered to the American company, property situated in Kentucky of the value of many thousands of dollars, including its office and business in the County of Harlan, from which a monthly income of about $10,000 was realized. It was further averred that the American company was indebted to the Adams company on account of dividends due on the stock it transferred to the Adams company in a sum in excess of the amount of the judgment.

On motion of the Adams company the summons issued against it and which was executed on the agent for the American company at Harlan, Kentucky, was quashed upon the ground that he was not at the time of the service of the summons the agent of the Adams company and no appeal is prosecuted from this order.

A general demurrer to the petition filed by the American company was also overruled and thereupon it filed its answer in which after denying in a general way that it was organized for the purpose of taking over the property and business of the Adams company and other express companies and also that the Adams company had transferred to it all of its property of every kind, character and description admitted that "in good faith without fraud and for a valuable consideration the Adams company had transferred and sold its property in the state of Kentucky to the American company."

It further denied that it was indebted to the Adams company in a sum in excess of the judgments as dividends on the stock delivered by it to the Adams company or in any sum on account of or growing out of any other transaction or that

it held any property or choses in action or evidences of debt in which the Adams company or its stockholders had any interest.

The affirmative matter in this answer was by agreement denied of record, and so the petition and answer constitute the only pleadings in the case.

Thereafter the depositions of Clark and Degnon, the only witnesses who testified in the case, were taken. Clark, who was an officer of the American company, testified that: On July 1, 1918, the American company purchased from the Adams company and other express companies all of their tangible property used or formerly used in express transportation operations throughout the United States, including the State of Kentucky:

"Q. I believe that you may state in your own way for the information of the court a brief history leading up to the sale and transfer of the property of the Adams company in Kentucky to the American company? A. After continued negotiations at Washington, the Director General of Railroads advised the executives of the express companies that he would not deal with more than one express company to operate over all federal controlled lines in the United States. Therefore, the old express companies were estopped from the right to carry on the express transportation business beyond June 30, 1918. Thereupon a new corporation was organized by the name of the American Railway Express Company which was successful in concluding a contract with the United States Railroad Administration for the opera-

tion of the express service over federal controlled lines throughout the United States, such contract to become operative on July 1, 1918.

The old express companies having no use for the tangible property used by them in the express transportation business and the new company having great need for this identical property, which in many respects is peculiar to the express companies negotiated for the sale, the American Railway Express Company contracted for the purchase of this tangible property used in express transportation over all the lines formerly operated by the old express companies, and this purchase and transfer of this tangible property was effected at midnight June 30, 1918, for a valuable consideration on the part of the American Railway Express Company, thereby enabling it to continue the express transportation business without interruption.

Q. I will ask you to state whether or not the Adams Express Company as a corporation, or rather a joint stock company, is or not still in existence with executive officers? A. The Adams Express Company is still in existence as a separate entity, with executive offices and officers in New York City.

Q. Is there or not any contract in existence between the Adams Express Company and the American Railway by the terms of which the American Railway Express Company has agreed, assumed, contracted or undertaken to pay the liabilities, debts and judgments of the Adams Express Company? A. There is not and has not been such a contract.

Q. On July 1, 1918, or about that date, did the American Railway Express Company own any

property or have any assets of its own before the property of the other express companies was transferred to it? A. It had not.

Q. What other express companies besides the Adams transferred their property to the American Railway Express Company? A. The Adams Express Company, the American Express Company, the Southern Express Company, Wells Fargo & Company, Great Northern Express Company, Northern Express Company and Western Express Company sold their tangible property used in the express operations to the American Railway Express Company.

Q. What was the whole consideration for this property purchased from these various express companies by the American Railway Express Company? A. Approximately $33,000.

Q. And what was the invoiced or agreed price of the property of the Adams Express Company turned over to the American Railway Express Company? A. The depreciated book value of each individual piece of property on July 1, 1918.

Q. And what did it amount to in dollars? A. Why, in round numbers, $8,000,000.

Q. I believe you have stated that the Adams Express Company bought some stock and paid cash for it from the American Railway Express Company. How much of the stock did the Adams buy and pay cash for? A. In round numbers between three-quarters of a million and one million dollars.

Q. What did the American Railway Express Company do with the three-quarters of a million dollars which you say the Adams stockholders paid for stock in the American Railway Express Company? A. The cash subscription which

was made to the American Railway Express Company for capital stock was used as a working fund with which to carry on its business, purchase supplies and generally to maintain its property.

Q. Can you reasonably find out the value of the Adams Express Company's property that was turned over in Kentucky to the American Railway Express Company? A. No. I cannot. It was all bulk.

Q. To whom was the eight million dollars or more stock of the American Railway Express Company, which represented the value of the property of the Adams Express Company, turned over? A. To the Adams Express Company.

Q. Was it turned over to the individual stockholders of the Adams Express Company or to the Adams Express Company as a joint stock company? A. To the Adams Express Company as a joint stock company."

THOMAS H. DEGNON, an officer of the Adams company, testified as follows:

"Q. Please state whether or not you know whether the Adams Express Company ceased to do an express business on July 1, 1918. A. It did cease.

Q Is the Adams Express Company still in existence? A. Yes.

Q. Please state whether or not, if you know, the Adams Express Company at the time of the transfer of the property used in the express business in the United States to the American Railway Express Company transferred its entire

assets, tangible and intangible of every description to the American Railway Express Company? A. It did not.

Q. Was there any assets reserved by it at the time of this transfer? A. There were.

Q. Has the Adams Express Company in your estimation still assets sufficient to meet its outstanding liabilities? A. I believe it has.

Q. Has it any tangible property to your knowledge? A. It has.

Q. Has it any real estate to your knowledge of which it is the owner? A. Yes.

Q Did the Adams Express Company on July 1, 1918, retain any property of any kind in Kentucky that it owned at that date? A. It did not.

Q. Has it now any property of any kind in Kentucky? A. It has none to my knowledge.

Q. This suit is to force the collection of judgments rendered by the Harlan Circuit Court, Harlan, Kentucky, against the Adams Express Company, amounting to $4,110.10, including costs. Has the Adams Express Company thought anything about paying these judgments or does it not intend to pay them unless it is forced to do so? A. I don't know anything about it.

Q. About what value of property did the Adams own in Kentucky prior to July 1st, and up to that date—1918? A. I have no knowledge or, rather, recollection.

Q. It did have a business in Kentucky and had property in Kentucky? A. It did.

Q. What kind of property did it own in Kentucky? A. Principally horses, wagons, equipments of various kinds, and, I believe, some real estate.

Q. How was that real estate transferred—by deed or otherwise? A. By deed.

Q. What did the Adams Express Company receive for this property in Kentucky which it transferred to the American Railway Express Company? A. Shares of stock of the American Railway Express Company, either received or to be received.

Q. Were the stockholders of the Adams Express numerous—many of them or only a few? A. Approximately three thousand.

Q. Is the Adams Express Company engaged in any kind of actual business now? A. No.

Q. For what purpose does it still retain its organization as a joint stock company? A. It still has assets undisposed of and also obligations to be settled.

Q. It is retaining its organization for the purpose of winding up its affairs only, is that what I understand you to say? A. That is all it has been doing up to this time.

Q. Do you know what understanding either in writing or otherwise, there existed between the American Railway Express Company, after July 1, or on July 1, 1918, for the payment of the outstanding obligations of the Adams Express Company at that date? A. There was an understanding between them.

Q. If you know, state what that understanding was in that regard? A. The understanding defined what the American Railway Express Company would undertake to settle outstanding obligations of the Adams Express Company solely for Adams Express Company's account without the assumption of any liability on the part of the American Railway Express Company, the Adams Express Company keeping the American Railway Express Company in funds sufficient to do so.

Q Do you know the amount of cash for the purchase of the stock of the American Railway Express Company paid by the Adams Express Company? A. Nine hundred thousand and some odd dollars.

Q. Did the Adams Express Company receive from the American Railway Express Company any cash or property consideration for any of its tangible property which the Adams turned over to the American Railway Express Company? A. Not to my knowledge.

Q. The only thing that the Adams company got from the American was stock? A. That is all.

Q. State whether or not in your judgment the Adams Express Company in Kentucky owned and turned over to the American Railway Express Company tangible property of the value of over $5,000? A. I believe so.

Q. Was this sale and transfer of this property in Kentucky by the Adams Express Company made with the intention to defraud any creditors of the Adams Express Company? A. I do not believe so.

Q. Approximately to the best of your judgment what is the value of the real and tangible property now owned by the Adams Express Company which it did not sell and transfer to the American Railway Express Company? A. According to the recent compilation by accountants, the Company had property of value in round figures $2,700,000 in excess of liabilities which it did not sell or transfer to the American Railway Express Company.

Q. And does the Adams Express Company still own this property? A. The Adams Express Company still owns that property."

On this evidence the outstanding facts in this case may be stated in this way:

(*a*) There was no merger or consolidation of the two companies. The American simply bought, and paid for in its stock, all of the property of every kind, character and description employed by the Adams in the express business, and took its place as an express company. The transaction being untainted by actual fraud of any description.

(*b*) The American did not pay to the Adams any consideration except the issual of its stock to the Adams to the amount of $8,000,000 and this stock although delivered to the Adams company was delivered to it, as we will assume to be held by it as trustee for the use and benefit of its stockholders or to be delivered by it to the stockholders in proportion to their respective rights.

(*c*) Before the sale, the Adams had ample tangible property, including real estate, in this State out of which the judgment could have been satisfied, and after the sale it had in this State no property of any kind or character that could be subjected to the satisfaction of the judgment; nor were any of its stockholders residents of this State.

(*d*) The Adams had in New York or some other State after the sale assets sufficient in value to satisfy the judgment, but whether these assets could be subjected to its payment is not certain, nor is it material whether this could or not be done.

(*e*) Immediately upon the sale, the Adams ceased to do business as an express company leaving no agent in the State for the service of process but retained its corporate identity merely for the purpose of winding up its affairs.

(*f*) The sale and transfer simply had the effect of putting the American company in consideration of its stock in the possession of all the property used by the Adams and other express companies in the conduct of their business and it continued to carry on the express business just as the selling companies had carried it on before the sale.

(*g*) We may also here state that under our constitution, and statutes, the Adams although a joint stock company organized under the laws of New York is to be treated in this State as a corporation. Whether its stockholders are personally liable for its debts, as in the case of a partnership, we are not able to say as we are not advised concerning the statutes of New York or the articles of association under which it was organized. And so, under these circumstances, we will treat it as a corporation.

On these facts, the precise question before us is: will a purchasing corporation that has paid the full purchase price to the selling corporation by the issue of its stock to it be responsible in law to the extent of the value of the property received, for the debts or liabilities, whether liquidated or unliquidated, or sounding in contract or tort, that were outstanding against the selling corporation at the time of the sale, when the effect of it is to leave the selling corporation without

any property in the state in which the liability accrued to satisfy it, although except for the sale it would have had ample property in the State, that could have been subjected to the payment of the liability; and may have property in some other State that could be subjected to the payment of the liability.

Questions concerning the responsibility of the purchasing corporation for the debts and liabilities of the selling corporation have come before the courts of the country in many cases, and it is held practically without dissent that although the purchasing corporation does not assume the payment of any of the debts or liabilities of the selling corporation, it will yet be made responsible for them if there was no consideration for the sale, or if it was not in good faith but for the purpose of defeating the creditors of the selling corporation, or where there has been a merger or consolidation of the corporations, or where the purchasing corporation took over from the stockholders, all of the stock of the selling corporation, or where the transaction amounts to a mere re-incorporation or re-organization of the selling corporation.

It is also generally agreed that when these conditions exist the purchasing corporation will be responsible for all the debts and liabilities of the selling corporation without reference to whether these debts or liabilities were created by contract or arose out of tort, or were liquidated or unliquidated.

It is equally well settled that when the sale is a bona fide transaction, and the selling corporation receives money to pay its debts, or property that may be subjected to the payment of its debts

and liabilities equal to the fair value of the property conveyed by it the purchasing corporation will not in the absence of a contract obligation or actual fraud of some substantial character be held responsible for the debts or liabilities of the selling corporation. Many illustrative cases fully supporting these propositions may be found in Vol. 5, Thompson on Corporations, Sec. 6517; 7 R. C. L., p. 180; 10 Cyc. 307; Notes in 11 L. R. A. (n. s.) 1119; 32 L. R. A. (n. s.) 616; 47 L. R. A. (n. s.) 1058.

The facts of this case do not however bring it directly within these rules, about which there is no disagreement in the authorities and so the American company can only be made liable, if at all, for the payment of these judgments upon the grounds (*a*) that it was a mere continuation of the Adams under a new name; (*b*) that the only consideration paid to the Adams was paid in the capital stock of the American company and (*c*) that the Adams company on account of the sale has no property or assets of any kind or character in this State that can be subjected to the payment of the judgments. These questions we will now proceed to consider.

In *Camden Interstate Railway Co.* v. *Lee*, 27 Ky. L. R. 75, the facts were these: Lee in a suit to recover damages for personal injuries obtained in February, 1901, a judgment against the Ashland & Cattlettsburg Street Railway Co. upon which an execution was issued and returned "no property found." Rose Hoffman also had a judgment, in a damage suit in February, 1901, against this company. While these suits were pending J. M. Camden purchased the stock of the street

railway company under an arrangement with the stockholders by which they agreed to take stock in the Camden Interstate Railway Company in exchange for the stock they held in the street railway company, and thereafter a deed was made by the street railway company to the Camden Interstate Railway Company conveying to it all of its property. As a result of this, Lee and Hoffman were unable to obtain satisfaction of their judgments against the street railway company and thereupon sought to make the Camden Interstate Railway Company liable for the judgments. In the sale the Camden company did not assume the payment of any of the debts or liabilities of the street railway company. In holding the Camden company liable, the Court said:

> "The sum of the transaction was that Camden either owned in his own right all the stock of the street railway company by way of purchase, or controlled it under contracts by which the stockholders agreed to take stock in the new company for the stock which they held in the old, and while he thus controlled all the stock in the street railway company, he caused that company to deed all of its property and franchises to the Camden Interstate Railway Co., and thus the stockholders in the street railway company became stockholders in the interstate railway company. In this way the stockholders in the street railway company put all of their property and franchises in the hands of the interstate railway company, and became stockholders in that company in lieu of the street rail

way company. By this means, the interstate railway company swallowed up or absorbed the street railway company."

In Harbison-Walker Refractories Co. v. McFarland's Admr., 156 Ky. 44, it appears that McFarland's administrator obtained a judgment against a corporation styled Harbison & Walker Company, that was solvent when the liability that resulted in the judgment accrued. After the accrual of the liability the owners of the stock of this company incorporated a new company, and thereafter the stockholders in both of these companies incorporated the Harbison-Walker Refractories Company for the purpose of taking over the property of the other two corporations and doing a like business. Pursuant to this arrangement the Harbison & Walker Company transferred all of its property to the new Harbison & Walker, and this corporation in turn transferred all of its property to the Refractories Company. These several transfers were accomplished merely by the purchasing companies taking over the assets of the selling companies, and issuing stock of the buying companies to the stockholders of the selling companies in lieu of their stock. After this, the administrator of McFarland brought suit against the Refractories Company to compel it to pay the judgment he had obtained against the Harbison Walker Company; and, in holding it liable for this judgment, the Court said:

"The 'Harbison & Walker Company, Southern Department', as well as the Portsmouth Harbison-Walker Company,

were, in reality, merged into the greater corporation, the Refractories Company, and the method of accomplishing that end cannot change the rights of creditors, since it resulted in a transfer of all the assets of the first-named company to the Refractories Company, without leaving with the selling company the purchase price of the assets so sold. In the case at bar the Refractories Company took over all the assets of the 'Harbison & Walker Company, Southern Department,' which was the original debtor, leaving it a mere shell, and without leaving with it any money or property whatever as a consideration for the sale of its assets. There was no liquidation of the 'Harbison & Walker Company, Southern Department,' by selling its assets and paying its debts; on the contrary, there was a transfer of all of its property to the Refractories Company without any attempt to pay appellee's debt. A subsidiary corporation cannot thus escape the payment of its liabilities. It is true these sales and transfers were all made by deeds of conveyance, and that the corporation had the right to sell its assets in that way, if it chose so to do; but the decision of this case depends upon the broad equitable principle that where one corporation takes over the assets of another corporation, without paying to it any consideration therefor, as is the fact in this case, the absorbing corporation takes the assets of the absorbed corporation *cum onere*."

In Justice's *Admr.* v. *Catlettsburg Timber Company,* 168 Ky. 665, a creditor of the Catlettsburg Timber Company, sought to hold liable the Dawkins company that purchased the assets and property of the Catlettsburg company, paying therefor a fair and valuable consideration in money. In holding that the purchasing corporation was not liable for the debts of the selling corporation the Court said:

> "The law is well settled that where one corporation voluntarily conveys all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subjects to an equitable lien or charge in favor of the creditors of the selling corporation, who may follow the corporation's assets, or the proceeds thereof, into the hands of whomsoever they can trace them, and subject them to the payment of the corporation's debts, except as against a *bona fide* purchaser for value. The rule does not operate, however, to disturb sales made in good faith, and for value, or in satisfaction of valid liens."

To the same effect is *Martin* v. *Sulfrage,* 159 Ky. 363; *Carter Coal Co.* v. *Clouse,* 163 Ky. 337; *Kentucky Distilleries and Warehouse Company* v. *Webb's Executor,* 181 Ky. 90; *Louisville and Nashville Railroad Co.* v. *Biddell,* 112 Ky. 494;

The case of *Chesapeake & O. Railroad Company* v. *Griest,* 85 Ky. 619, apparently laid down principles somewhat at variance with these later cases but what was said in the *Griest* case was not approved or following in any of them.

In *Jennings, Neff & Co.* v. *Ice Co.*, 128 Tenn., 231, 47 L. R. A. (n. s.), 1058, it appears that the Crystal Ice Company, a Georgia corporation, transferred all of its property to the Atlantic Ice & Coal Company, a Virginia corporation, and the Crystal Ice Company ceased to do business but retained its corporate entity for the purpose of winding up its affairs. Prior to this sale, Jennings, Neff & Co. had brought suit against the Crystal Ice Company, and this suit was pending at the time of sale. After the sale, it obtained judgment against the Crystal company, upon which execution issued and was returned "no property found."

In the transaction, the Atlantic company assumed the payment of certain debts of the Crystal company, but not the debt of Jennings, Neff & Company. Aside from this, the only consideration received by the Crystal company for its tangible property in Tennessee, which was valued at about $300,000.00, was stock and bonds of the Atlantic company, which were distributed to the stockholders of the Crystal company. In a suit by Jennings, Neff & Company to make the Atlantic company liable for its judgment against the Crystal company, the Court after stating the familiar doctrine that corporate assets are a trust fund for the payment of the debts of the corporation, a principle that has been time and again announced by this Court, said:

> "It follows that when this purchasing corporation took over in exchange for its own stock and bonds the assets of the other,

and permitted these securities which it had substituted for the visible, tangible property of the selling corporation to be distributed among the shareholders of the latter, without provision for the creditors of the latter, it thereby became a party, with full notice, to diversion of a trust fund. As such, the purchasing corporation holds the property so acquired impressed with the same trust with which said property was originally charged, and the purchasing corporation is liable to the creditors of the selling corporation to the extent of the value of the property thus obtained.

Creditors of the old corporation cannot be required to look alone to the stock and bonds which were substituted for the real, tangible assets of that corporation. The value of securities so substituted is more or less problematical, and creditors should not be forced to surrender their claim against available visible assets, and transfer such claim to new securities. Their remedy cannot thus be hindered and impaired for the benefit of stockholders.

* * * * * * *

Furthermore, these were securities of a foreign corporation, and were distributed among nonresidents of the State, and we are unwilling to approve any device by which tangible property of a corporation located here and subject to the debts of that corporation can be withdrawn from the reach of creditors and distributed among nonresident stockholders. Cor-

porate creditors may not be thus deprived of available security for their claim and forced to resort to difficult and inconvenient litigation in foreign States."

In *Grenell* v. *Detroit Gas Co.*, 112 Mich. 70, a judgment creditor of the Michigan Gas Company sought to make the Detroit Gas Company, the purchaser of the Michigan Gas Company, liable for a judgment against the selling companys. In that case the Detroit Gas Company was organized for the purpose of taking over the business of the Michigan Gas Company, and pursuant to this arrangement it purchased all of the property and assets of the Michigan Gas Company and paid for the same by its shares of stock. The Court said:

"If this transaction be viewed in the light that the defendant appears to desire it to be, viz., that these corporations are separate entities, and that the Detroit Gas Company purchased the property of the Michigan Gas Company, yet the bill shows that such purchase included all of the property of the vendor. It must have known, or, if not, it was its duty to understand, that nothing was reserved to pay outstanding indebtedness, if there were any. It paid nothing to its vendor for this plant, but dealt with its stockholders, paying to them, in its own capital stock, the price of its purchase; thus, in effect, closing out the corporate business, and dividing its assets among its stockholders. Under such circum-

stances, we think a legitimate inference is that the purchase was made subject to the application of so much of the property as might be necessary to the payment of the debts of the Michigan Gas Company, if not with the understanding that all debts should be paid by the purchaser. Again, a corporation cannot sell all of its property, and take in payment stock in a new corporation, under an arrangement that has the effect of distributing the assets of the vendor among its stockholders, to the exclusion and prejudice of its creditors; and a company making such a purchase, in consideration of an issue of its own stock to such stockholders, takes the property subject to the rights of creditors. Such an arrangement is a diversion of the trust fund.

It is said that there is nothing to show an intention to defeat the creditors of the Michigan Gas Company, as this was not a liquidated claim at the time this transfer was made. Under the arrangement, the promoters and stockholders of the Detroit Gas Company knew that it was getting all of the property of the Michigan Gas Company, without provision for its debts, if there were any. It was bound to know that this property was charged with such debts, and ought not to be distributed among the stockholders to the exclusion of creditors. It was a party, then, to a diversion of the trust fnud, and, having in its possession such fund, holds it subject to

the payment of debts. It cannot be called a *bona fide* purchaser of the property, as against existing creditors."

Another instructive case is *Hibernia Insurance Company* v. *St. Louis and New Orleans Transportation Company,* 13 Fed. Rep. 516; in that case it appears that the Babbage Transportation Company sold all of its property to the St. Louis and New Orleans Transportation Company in consideration of stock in the latter company and the payment of certain of its debts. The stockholders in the two companies were substantially identical. The suit was to require the purchasing corporation to pay a debt due by the selling corporation and the Court said:

"The fair inference from the transaction is that the old company was about to be dissolved, and to cease to be. It was to be absorbed by the new company. This is the inevitable consequence of the formation of the new company, composed substantially of the same persons, to transact the same business at the same places, and with the same property. By the transfer, the creditors of the old company were deprived of the means of enforcing their claims. Probably no officers of the old company have since been elected, and it is to be presumed that none will be. This being so, it is at least doubtful whether service of process could be obtained so as to procure a judgment at law against the old company. And if a judgment were obtained, it could not be collected out of any assets in the pos-

session of the old company because it had turned all its assets over to the new company. It has received, it is true, paid-up stock in the new company, but that has doubtless been disposed of; or, if it has not been, it may at any moment be transferred. Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed upon the market.

A distinction with respect to transactions of this character exists between a corporation and a natural person. A natural person may sell all his property for a fair consideration, if the transaction is *bona fide*, and the buyer will not be required to take care that the seller provides for and pays all his debts. A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of the means of paying its debts, but may deprive itself of corporate existence, and place itself beyond the reach of process at law. At all events, equity cannot permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts; and that is the exact case now before us.

Here was a corporation engaged in a profitable business, and owning and possessing property valued at $92,000.00 ex-

clusive of its franchise. It owed debts confessedly amounting to more or less than the value of its property. It ceases to transact business. Its stockholders organized themselves into another corporation, and all the property is transferred from the old to the new. It matters not that the stockholders in the two companies may not be precisely identical. We are not prepared to say that it would make any difference if the members of the new company were none of them interested in the old. The thing which we pronounce unconscionable is an arrangement by which one corporation takes from another all its property, deprives it of the means of paying its debts, enables it to dissolve its corporate existence and place itself practically beyond the reach of creditors, and this without assuming its liabilities. The fact here, however, appears to be that the owners of the two corporations are substantially identical, and hence there is a still stronger case in equity."

Another very pertinent case is *Altoona* v. *Richardson*, 81 Kan. 717. In that case the Richardson Gas and Oil Company, a corporation, at a time when it was indebted to the City of Altoona transferred all its property to the Altoona Portland Cement Company in consideration of $600,000 of the common stock of the later company which continued the same business the Richardson Company had been engaged in. Thereafter the city sued and obtained judgment against both companies for its indebtedness.

There was no serious question as to the liability of the Richardson Company but the Altoona Company contended that it occupied the attitude of an ordinary purchaser of property and not having contracted to pay the indebtedness of the Richardson Company it was under no obligation to do so, on the other hand the city insisted that the transaction between the two corporations was a virtual if not a technical consolidation—that the new company was a successor of the old and liable for its debts.

In considering the case and holding the purchasing corporation liable the Court said:

> "In the present case it was not positively and directly proved that the old company distributed among its stockholders the stock in the new company which it received in consideration of the transfer of its property, but that is inferable from the evidence."

And further said:

> "We think it consistent with the weight of authority and in accordance with sound reason to hold that the equitable right of the creditor to look for payment to the property of a debtor corporation is superior to any title that can be acquired through such a transaction as that here disclosed. We affirm the judgment upon the ground that where a corporation becomes practically extinct, transferring all its assets to another and receiving in return stock in the other corporation, which succeeds to

> its business, the new corporation is liable, to the extent of the value of the property acquired, for the debts of the old one. Such an arrangement is essentially a merger, and should be attended with the same consequences as a consolidation."

In the *Editorial Note to Luedecke* v. *Des Moines, Cabinet Company*, 32 L. R. A. (n. s.) p. 617, it is said, that:

> "The transfer of one corporation to another may amount to a merger in fact although the corporate existence of the transferrer corporation continues. In such case equity looks past the form and at the real effect of the transaction and by an application of the trust-fund doctrine holds the transfer liable to the extent of the assets received as in such case it is not a *bona fide* purchaser for value."

In *Chicago Railroad Company* v. *Taylor*, 183 Ind. 240, the Court said:

> "Where the property is taken without compensation to the original company other than the issuance of stock to it in the new organization the latter should be charged with such unpaid claim as exist against the property taken, at least in an amount equal to the value of such property."

Many other cases announcing principles similar to those set forth in the ones quoted from might be referred to but those noticed are amply sufficient for the purposes of this case and give

abundant support to the conclusion we have reached that the American Company should be held liable for the claim sued on.

It is true that in the cases referred to it appeared that the purchasing corporation had bought all the assets and property of the selling corporation, while in this case it appears that the selling corporation has some property in another State but we do not regard this circumstance as sufficient to defeat the wholesome principle running through these cases that the rights of creditors are superior to the rights of stockholders and a corporation will not be allowed to defeat its just, obligations by sale or transfer of its property for no other consideration than stocks or bonds in the purchasing corporation. We have merely extended this wholesome principle for the better protection of creditors and this without prejudice to the rights of selling or purchasing corporations that desire to do what is just by the creditors of the selling corporation.

A careful consideration of the facts in all these cases and the conclusions of the courts makes it clear that the circumstances that *was* ultimately seized hold of to make the purchasing corporation liable, was that the selling one was paid for its property in the stock of the purchasing corporation, and the property of the selling corporation to which the creditors might look with certainty for the payment of their debts was turned over to the purchasing corporation; and cases involving questions like the one we have, disclose the further fact, that when one corporation sells its property and business to another, it is usually the case, that the selling corporation takes its pay in the stock of the purchasing concern.

But the court looking through the various forms invented to impart not only validity to the transaction but to save the purchasing corporation from liability for the debts of the selling one, have in almost every case in which the selling corporation received nothing more than stock, held the purchasing corporation liable for the debts of the selling corporation; when however money or property of fair value was delivered as the purchase price, the purchasing corporation in the absence of fraud or contract obligation was relieved from liability.

All the cases also hold that where there is a merger, or consolidation or re-incorporation or re-organization and a continuance of the business under a new name the corporation taking over the assets and property of the corporation extinguished for all practical purposes will be liable for its debts, and as before said, in virtually all this class of cases, the corporation that went out of business was paid for its property in stock of the new corporation.

Keeping these rulings in mind it is difficult to find any substantial difference between the methods of absorption often employed, as in the case of a merger or re-incorporation or re-organization and a straight out sale like the one here in question when the selling corporation gets nothing but stock in the purchasing one.

It is true there is no direct evidence that the stockholders of the Adams received or will receive in exchange for their stock the stock of the American that was delivered as shown by the evidence to the Adams but it is fair to, and we will, assume that this stock was turned over to the Adams for distribution to its stockholders

as their rights may appear because they owned the whole beneficial interest in the property that was given up for this stock and the clear inference is that the Adams as a corporate entity holds this stock in trust for its shareholders or to be delivered to them.

Neither should it be overlooked that the record shows that the American was organized for the sole purpose of taking over the property and business and pursuant to this arrangement did, take over the business and all the property employed therein of the Adams and the other express companies and continued under a new name and a new organization the precise business they were engaged in, nor is it open to doubt that the great bulk of its stock is owned by the stockholders in these old companies although there may be many new share holders. Indeed it would not be wide of the mark to say that the American under a new name and new organization was merely a continuation of all the old companies as this was in effect the result of the sale and transfer of the business and property.

But it is said that the Adams is yet a corporation and owns property more than sufficient to satisfy its debts. It is true that it yet has a corporate existence but no suit can be maintained against it in this state and all of its property that had a situs in this state has been taken from it. So far as Kentucky creditors are concerned it is nothing more than a mere shell and a very empty one at that. If it owns tangible property of value none of it is in this state and more than likely it has none outside the state that can be seized and subjected by pursuing creditors. At any rate it is plain that the creditors in this state in order

to make his debt would be required, to go to the State of New York, and find there if he could, property to satisfy his debt, and then resort to the courts of New York to try to collect it. We say this because the Adams company so far as this record shows has no disposition to pay this debt and we may assume will resort to every possible means to defeat its collection.

Of course, a corporation may sell its property and all of it of every kind, just as any natural person may and when it does this and receives its fair value in money to pay its debts, or property that the creditor can subject to the payment of its debts, a purchaser in the absence of a contract obligation cannot be held for the debts and liabilities of the selling corporation.

But when the selling corporation disposes of all its property and takes for it shares of stock in some other corporation and both the buyer and seller refuse to pay the debts of the seller it is perfectly plain that the rights of creditors of the seller have been prejudiced by the sale, as to them the sale is constructively fraudulent and for this reason courts, will hold the purchasing corporation liable for the debts of the selling one.

The substantial difference between a corporation and an individual so far as the sale of all its or his property is concerned, is that the corporation is a creature of the law. There is no personal liability. All it has for the payment of its debts is its property and assets and the law, for the protection of creditors has impressed this property with a trust character for the payment of debts and said that the corporation holds it for the benefit of its creditors and when it parts with this property getting in return nothing the

creditor can subject, the law will follow the property into the hands of the taker and make it liable to the extent of the value of the property received.

When the American bought the Adams, that company had for years been engaged in an extensive business throughout the United States and the American must have known that it had liabilities, but no provision whatever was made for their payment and it now says to the creditors of the Adams in Kentucky, if you want your money go to the State of New York and try to get it. We will not give our sanction to a scheme like this, and the conclusion we have reached is supported by abundant authority.

Under all the facts and circumstances of this case, the American might well be held liable on the theory that it was merely a continuance of the old companies under a new name. We prefer however to put our decision upon the distinct ground that when one corporation foreign or domestic, takes over the business and property of another that had in this state sufficient tangible property subject to execution to satisfy all its debts in this state and pays for the property so taken over in nothing more than its stock, it becomes liable to state creditors of the selling corporation to the extent of the value of the property it has received in the sale, although the selling corporation may retain its corporate entity for the purpose of winding up its affairs, and have in some other state, property that might be subjected to the payment of its debts and this upon the ground that such a sale is constructively fraudulent.

This rule is not an unreasonable or harsh one nor will it in any manner interfere with the sale

by a corporation of its property and business or subject the purchasing corporation if it uses reasonable care as it may easily do to protect itself from the liabilities of the selling corporation. All it need do is to make arrangements in the articles of sale for the payment of the debts of the selling corporation to the extent of the value of its property conveyed or pay for this property in money or other things of value that the creditors of the selling corporation may look to for the payment of their debts.

In view of the multitude of various enterprises in which corporations are engaged and the fact that creditors can only look to the property of the corporation for the payment of their debts it is nothing more than just and reasonable that the corporation should not be allowed to dispose of its property and business without getting something in return to pay its debts.

In considering this case we have not thus far noticed the authorities relied on by counsel for the American Company, the principal one being *McAlister* v. *The American Railway Express Company*, 103 S. E. Rep. 129. In that case as in this the American Company took over the business and property of the Southern Express Company at the same time and for the same reason and under the same circumstances that it took over the property and business of the Adams Company.

McAlister in that case sought to make the American liable for a claim he had against the Southern. The facts of the two cases are as nearly alike as the facts of two cases could well be, but the North Carolina Court reached the conclusion that the American Company was not liable, put-

ting its decision upon the ground that the purchasing company in the absence of contract obligation or fraud cannot be held liable for the debts of the selling corporation when there has been no merger or consolidation and the selling corporation does not become extinct and retains sufficient property to pay its debts.

We do not however, find ourselves willing to agree with the North Carolina court although its decision finds some support in the authorities. We are well satisfied that the great weight of modern authority as well as the right of the case supports the conclusion we have reached.

Wherefore the judgment is affirmed.

IN THE

Supreme Court of the United States.

AMERICAN RAILWAY EXPRESS COMPANY,
Petitioner,

—against—

THE COMMONWEALTH OF KENTUCKY,
Respondent.

MEMORANDUM FILED BY PETITIONER, PURSUANT TO LEAVE OF COURT.

This memorandum is filed solely with reference to the case of *Pierce* v. *United States,* 255 U. S. 398, mentioned by Mr. Justice Brandeis on the argument in this court on January 29th, 1925.

The question asked by Mr. Justice Brandeis was whether that case was not a direct authority against the contention made by the petitioners in the first point of its brief, *i. e.,* that plaintiff's claim against the Adams Express Company for fines recoverable under a penal statute was not a debt at the time of the transfer by the Adams Express Company to the petitioner of its property within the State of Kentucky.

In the *Pierce* case, the Waters Pierce Oil Company was indicted in 1907 for receiving rebates under the Elkins Act. These indictments hung fire until 1914, when the case was tried and Waters Pierce Oil Company was convicted and sentenced to pay a fine of $14,000. Execution

was issued on the judgment for the fine against the Waters Pierce Oil Company and returned unsatisfied.

Meanwhile, in 1913, the Waters Pierce Oil Company had transferred all its property to the Pierce Oil Corporation, which agreed to assume the "debts, obligations and liabilities" of the Waters Pierce Oil Company. The purchase price which the Waters Pierce Oil Company received from the Pierce Oil Company was paid over to certain trustees, who distributed the same among the stockholders of the Waters Pierce Oil Company. The Government brought an action in the nature of a creditor's bill against the Waters Pierce Oil Company and the Trustees and the three stockholders, among whom the property of the Waters Pierce Oil Company had been distributed. It appears that an action had been originally commenced by the Government against the Pierce Oil Company, which had expressly assumed the "debts, obligations and liabilities" of the Waters Pierce Oil Company, but this action was discontinued.

This Court held that a creditor's bill would lie on the judgment for the fine and affirmed the judgment of the lower court against the Trustees of the Waters Pierce Oil Company and the three stockholders to whom property had been distributed.

We respectfully submit that this case is not direct authority for the proposition that if an action had been brought against the purchasing corporation, the Pierce Oil Company, the Government's claim would have been held to be a debt which it assumed by its agreement. Nor is it

authority for the proposition that in an action brought under the new rule laid down by the Kentucky Court, the state's claim for fines due under a penal statute would make it a creditor of the Adams Express Company at the time the petitioner acquired its Kentucky property. The rule as laid down by the Court of Appeals of Kentucky is that where one corporation purchases from another corporation or partnership all the assets of the selling corporation or partnership within a particular state (the selling corporation retaining, however, large assets in other states), and the purchasing corporation pays for the property so acquired only in stock of such purchasing corporation (but less than a controlling interest in such stock), the purchasing corporation is liable to the extent of the property so acquired to the creditors of the selling corporation in the state where such property was located.

We believe that the courts should be stricter in construing the meaning of the word "creditor" in applying a rule such as is laid down by the Court of Appeals of Kentucky than they would be in applying the ordinary and well established rules of the common law with reference to the assumption of liability by one corporation for the debts of another by reason of express agreement or by an applied agreement arising out of the purchase of the *entire assets* of the selling corporation, in exchange for a *controlling interest* in the stock of the purchasing corporation. Certainly, we believe, that the word "creditor" should be more strictly construed in the application of this new rule of law laid down by the Court of Appeals of Kentucky than where it is applied to a

case of distribution by a corporation of all its assets to its stockholders in actual fraud toward its creditors.

It is significant that in the *Pierce* case this Court thought it relevant to refer specifically to the fact that the stockholders receiving the assets were in the position of volunteers and that they were officers of the corporation, and therefore could not have been ignorant of the Government's claim.

We respectfully submit that the decision in the *Pierce* case is not an authority for the proposition that in the present case the claim of the Commonwealth of Kentucky constituted it a creditor, which would make the American Railway Express Company liable to it to the extent of the assets, received from the Adams Express Company, where it specifically appears that the Adams Express Company was not transferring all its property to the American Railway Express Company, that there was no identity of control, and that the stock issued by the American Railway Express Company for the property of Kentucky was less than one-third of one per cent. of the total issued stock of the American Railway Express Company and possessed an intrinsic book value, irrespective of the property acquired in Kentucky, of over $99 per share.

CHARLES W. STOCKTON,
Solicitor for Petitioner.

KENNETH E. STOCKTON,
Of Counsel.

No. 305

IN THE

Supreme Court of the United States,

OCTOBER, 1925.

AMERICAN RAILWAY EXPRESS COMPANY,

Defendant-Appellant,

—against—

COMMONWEALTH OF KENTUCKY,

Plaintiff-Respondent.

APPELLANT'S BRIEF ON REARGUMENT.

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IN THE

Supreme Court of the United States,

OCTOBER, 1925.

AMERICAN RAILWAY EXPRESS COMPANY,
Defendant-Appellant,

—against—

COMMONWEALTH OF KENTUCKY,
Plaintiff-Respondent.

APPELLANT'S BRIEF ON REARGUMENT.

Statement.

This case comes before this Court on a review by certiorari of a judgment of the Court of Appeals of Kentucky affirming a judgment in favor of the plaintiff-respondent in an action brought by the Commonwealth of Kentucky against the defendant-appellant, American Railway Express Company, on which a reargument is ordered by this Court.

The action was brought in equity to hold the American Railway Express Company liable for the amount of a judgment theretofore secured by the Commonwealth of Kentucky against the Adams Express Company, on which execution had been returned unsatisfied.

This is the second case of this character to come before this Court, the first having been brought up on

writ of error and dismissed for lack of jurisdiction on October 8, 1923, on the ground that the plaintiff's only remedy was by certiorari.

Testimony in the previous case is by stipulation incorporated in the present case and additional testimony has been taken to clear up possible deficiencies of proof in previous record. Since no opinion was rendered by the Kentucky Court of Appeals in affirming the judgment in the instant case, we have set out in full the opinion rendered in the first case in the appendix annexed to this brief. This is the only expression of the Kentucky Court of Appeals setting forth its reason for its decision herein.

The Adams Express Company (hereinafter referred to for convenience as the "Adams") is a joint stock association organized under the common law of New York. Its members or shareholders are unlimitedly liable for the debts and liabilities of the association. It is neither more nor less than a huge general partnership operating under a firm name (R., p. 115). The original claim against the Adams arose under the following circumstances.

In 1916 the local agent of the Adams at Harlan, Kentucky, is alleged to have failed to keep with the particularity demanded by the penal statute of Kentucky certain records with reference to incoming shipments of liquor; and for these alleged failures prosecutions were commenced prior to June 30, 1918, in the name of the Commonwealth of Kentucky against the Adams under such statute. The actions were pending in the Circuit Court of Harlan, Kentucky, until January, 1921, when they were brought to trial, the Adams was convicted and judgment rendered against it for fines amounting in the

aggregate to approximately $3,000 (R., p. 3). In the meantime the Adams transferred to the American Railway Express Company, a Delaware corporation, its operating equipment in the State of Kentucky, and elsewhere, in satisfaction of a subscription by the Adams to the capital stock of American Railway Express Company (R., p. 44). The value of the equipment in Kentucky was $93,000 and the amount of the stock issued to the Adams therefore was less than 1% of the total issued stock of the American Railway Express Company (R., p. 78). (It is not disputed that in the same sale the American Railway Express Company acquired from the Adams property located in other states and cash of the aggregate value of $8,600,000 the total amount of the subscription of the Adams. This fact, however, was not relied upon by the State court in arriving at its conclusion and is quite irrelevant to the present issues.)

These are the simple and undisputed facts upon which the decision of the Kentucky Court of Appeals was based and the only issue involved is a question of law. There is no evidence in the record on which to predicate an intentional assumption of liability of any of the obligations of the Adams by the American Railway Express Company. On the contrary, there is abundant evidence by witnesses competent to testify that the American Express Company never, either by express undertaking or by any course of conduct, assumed any of the obligations of the Adams (R., pp. 35, 43, 75).

We also think that it will be undisputed that there was never any consolidation or merger of the Adams into the American Railway Express Company in either a legal or a practical sense. The total value of the property transferred by the Adams to the American Railway

Express Company on July 1, 1918, including that relevant to this action, was approximately $8,600,000, while the total assets of the Adams at that time were approximately $63,000,000 (R., p. 74). It did not transfer to the American Railway Express Company its foreign business or its money order business. No steps have ever been taken for dissolution of the Adams, and as a matter of fact in March, 1922, it resumed active business operations in the City of New York in the transportation of money and securities (R., p. 75). It has always had its offices in the City of New York at which its executive officers transact the business of the association. No stock of the American Railway Express Company has been distributed to the stockholders of the Adams. It has conducted the investigation and payment of its own claims with the exception of the brief period between July 1, 1918, and February 1, 1919 (R., p. 76). None of the officers of the Adams are officers or employes of the American Railway Express Company, and only four of the twelve directors of the American Railway Express Company are in any way connected with the Adams (R., p. 76). The Adams owns less than one-third of the issued and outstanding stock of the American Railway Express Company. The opinion of the State Court specifically admits that there was no merger or consolidation (Appendix, p. 75). It will, we think, be undisputed that there was no actual fraud in the acquisition by the American Railway Express Company of the operating equipment of the Adams in the State of Kentucky. The circumstances attending the transfer of the property arose out of the exercise by the Director General of Railways of the powers deemed by him necessary for the successful prosecution of the war (R., pp. 71, 74, 33, 35).

On December 28, 1917, the President of the United States acting under the war powers conferred on him by Congress took over all the railroad lines of the United States and vested control of them in his agent the Director General of Railroads. The Adams, Southern, American and Wells Fargo & Company had been operating over railroad lines under contracts, and they immediately made application to the Director General of Railroads to ascertain whether they had been taken over with the railroad lines or if not whether the Government would carry out the contracts of the railroads for express facilities. They were advised that they had not been taken over and that the Director General would not take them over nor allow them to operate on the railroads as separate entities. They were advised that express transportation must be unified to operate over the unified railroad system controlled by the Director General and that a new express company must be organized to act as the agent of the Director General; for that purpose the stock of such new corporation must be subscribed by them respectively and that their property used in carrying on their express transportation business in the United States, but not including cash or treasury assets, must be transferred to such new corporation. The Adams and other Express Companies were thus forced out of business in any case by the requirements of the Director General. They had the choice of selling their domestic operating equipment in a lump as required by the Director General to a new express company or of selling it piecemeal at the various points throughout the United States at which their wagons and other operating equipment were located (R., p. 41).

In such a situation common sense and patriotism alike

dictated the acceptance of the first alternative; and the old express companies on June 21, 1918, entered into an agreement with the Director General in accordance with his requirements whereby they undertook under his direction and control to organize the American Railway Express Company and to subscribe for all its capital stock and to transfer to it all their domestic operating equipment at its fair market value, together with the necessary cash for working capital, in satisfaction of such subscription to stock of the American Railway Express Company at par. This involved the issue to the Adams of about $8,600,000 par value of the stock of the American Railway Express Company and about $25,000,000 to the other Express Companies included in the agreement. On his part the Director General agreed to execute a contract with the American Railway Express Company, making it his agent to operate over the railroad lines under his control. This contract is set forth in full at page 87 of the record. The agreement between the Director General and the old express companies did not provide for the merger or consolidation of the old companies into the new company. In fact, it expressly required them to maintain their corporate existence, and they have done so up to the present time and have continuously owned and dealt with assets which were not sold to the American Railway Express Company (R., p. 43).

These agreements were duly carried out and the Adams subscribed for $8,600,000 par value of stock of the American Railway Express Company and on July 1, 1918, transferred to the American Railway Express Company its tangible property used in its domestic express transportation business in the United States, as well as

about $900,000 in cash and received the stock subscribed for. At the same time approximately $25,000,000 par value of the capital stock of the American Railway Express Company was issued to Wells Fargo & Company, the American Railway Express Company and the Southern Express Company at par upon their respective transfers for their respective domestic operating property and cash working capital paid in by them.

Certainly it cannot be claimed that the American Railway Express Company was a party to any actual fraud. It was formed at the requirement and under the direction of the Director General of Railroads. Not a share of stock was issued for anything except physical property at its fair market value which represented cost less depreciation. If the American Railway Express Company were a party to actual fraud, the Director General of the United States and his entire corps of advisers were also parties to the same fraud, for the transaction was planned and carried out, not only with their approval, but practically at their command. As a matter of fact, the Court of Appeals of Kentucky finds in its decision that there was no actual fraud (Appendix, p. 75). The Court of Appeals of Kentucky did not base its decision upon the ground of merger, express agreement or actual fraud. Its opinion clearly recites the facts and assumption of fact upon which it bases its decision in the following language, in which we have italicized certain assumptions which are without support in the record.

> (a) There was no merger or consolidation of the two companies. The American simply bought, and paid for in its stock, all of the property of every kind, character and description employed

by the Adams in the express business, *and took its place as an express company,* the transaction being untainted by actual fraud of any description.

(b) The American did not pay to the Adams any consideration except the issual of its stock to the Adams to the amount of $8,000,000 *and this stock although delivered to the Adams Company, was delivered to it, as we will assume, to be held by it as trustee for the use and benefit of its stockholders or to be delivered by it to the stockholders in proportion to their respective rights.*

(c) Before the sale, the Adams had ample tangible property, including real estate, in this State out of which the judgment could have been satisfied, and after the sale it had in this State no property of any kind or character that could be subjected to the satisfaction of the judgment; *nor were any of its stockholders residents of this State.*

(d) The Adams had in New York or some other State after the sale assets sufficient in value to satisfy the judgment, *but whether these assets could be subjected to its payment is not certain, nor is it material whether this could or not be done.*

(e) Immediately upon the sale, the Adams ceased to do business as an express company leaving no agent in the State for the service of process but retained its corporate identity *merely for the purpose of winding up its affairs.*

(f) The sale and transfer simply had the effect of putting the American company in consideration of its stock in the possession of all the property used by the Adams and other express companies

in the conduct of their business *and it continued to carry on the express business just as the selling companies had carried it on before the sale.*

(g) *We may also here state that, under our constitution and statutes, the Adams, although a joint stock company organized under the laws of New York, is to be treated in this State as a corporation. Whether its stockholders are personally liable for its debts, as in the case of a partnership, we are not able to say as we are not advised concerning the statutes of New York or the articles of association under which it was organized. And so, under these circumstances, we will treat it as a corporation.*

On these facts, the precise question before us is: will a purchasing corporation that has paid the full purchase price *to the selling corporation* by the issue of its stock to it be responsible in law to the extent of the value of the property received for the *debts or liabilities*, whether liquidated or unliquidated, or sounding in contract or tort, *that were outstanding against the selling corporation at the time of the sale*, when the effect of it is to leave the selling corporation without any property in the state in which the liability accrued to satisfy it, although except for the sale it would have had ample property in the State that could have been subjected to the payment of the liability; and may have property in some other State that could be subjected to the payment of the liability.

The decision of the Court of Appeals of Kentucky, therefore, rests upon two facts which appear in the record and four assumptions which have no support in the record.

The facts are——

1. That the appellant took over all of the operating property of the Adams employed in its domestic express business.

2. That the appellant paid the Adams no consideration except the issue of its stock to the Adams.

The assumptions are——

(a) That the stock delivered to the Adams was distributed among the shareholders of the Adams or delivered to a Trustee for such distribution;

(b) That the Adams was a corporation;

(c) That the Commonwealth of Kentucky was a creditor of the Adams at the time of the sale;

(d) That the stock of appellant was not valid consideration for the property.

The Court held (1) that the property of the Adams within the State of Kentucky was impressed with a trust for the benefit of Kentucky creditors; and (2) that the American Railway Express Company was guilty of constructive fraud in acquiring this property in exchange for its own stock and was not a *bona fide* holder for value, so as to cut off rights of general creditors of the Adams to follow its property for satisfaction of their claims.

The appellant contends that the decision of the State Court deprives it of its property without due process of law, because (1) it proceeds upon a principle of law based on assumptions of fact which are unsupported by

the record; (2) that it attempts to do by judicial decision what would be unconstitutional in a statute of similar effect; and (3) that the decision is contrary to the established principles of common law and is an attempt at judicial legislation under the police power of the State which cannot be retroactively applied to affect vested rights.

POINT I.

The basis of fact upon which the Court of Appeals of Kentucky rested its decision denying the asserted federal right has no support in the record.

The Kentucky Court assumes, first, that the appellant distributed to the shareholders of the Adams Express Company the stock which was the consideration for the transfer of the property of the Adams or delivered such stock to the Adams to be so distributed; second, that the Commonwealth of Kentucky was a creditor of the Adams at the time it transferred its Kentucky property to the American Railway Express Company on July 1, 1918; third, that the Adams was a corporation; fourth, that $8,600,000 par value of appellant's stock was not valuable consideration.

It is impossible to read the Court's opinion in this case without realizing that these assumptions were the cornerstones upon which it constructed its theory that the American Railway Express Company was liable for the debts and liabilities of the Adams Express Company. An examination of the record clearly shows that these

assumptions which were necessary to the decision of the Court are absolutely without support in the record. Not only is the record in this case bare of any evidence tending in the faintest degree to support such assumptions, but it appears clearly and affirmatively from the record that they were contrary to fact.

It appears from the deposition of W. M. Barrett (R., p. 68) that the $8,600,000 of the stock of appellant was issued to the Adams and not to its shareholders; that none of the stock of the American Railway Express Company issued to the Adams, has been distributed to the stockholders of the Adams and that it is still in the treasury of the Adams.

It appears from the plaintiff's petition in equity, filed June 2nd, 1921 (R., p. 1) that the criminal prosecutions against the Adams under subsection 3, Section 2569B of the Kentucky Statutes were still pending in the Harlan Circuit Court on June 30, 1918, and that none of these prosecutions came on for trial until January, 1921.

With reference to the third assumption, the state Court said, in its opinion concerning the prior case (Appendix, p. 76):

> "We may also here state that under the constitution and statutes, the Adams although a joint stock company organized under the laws of New York is to be treated in this state as a corporation. Whether its stockholders are personally liable for its debts, as in the case of a partnership, we are not able to say as we are not advised concerning the statutes of New York or the articles of association under which it was organized.

> And so, under these circumstances, we will treat it as a corporation."

However, to rebut any such presumption in the present case, there was introduced in evidence uncontroverted testimony to the effect that the Adams was a joint stock association organized under the common law in the State of New York, the stockholders of which are fully liable for all the obligations of the association (R., p. 116).

These erroneous assumptions of fact, if material to the decision of the State court, bring the case within the application of the rule that where the decision of the State court, denying the asserted Federal right, has no support in the record it is the duty of this Court to review and correct this error.

Postal Tel. Cable Co. v. *Newport*, 247 U. S. 464, 473:

> "But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted Federal rights has any support in the record; for if not, it is our duty to review and correct that error."

Southern Pacific v. *Schuyler*, 227 U. S. 611;

N. C. Railway Co. v. *Zachary*, 232 U. S. 248, 259;

Carlson v. *Curtiss*, 234 U. S. 103-106;

Norfolk & Western Railway Co. v. *Conley, Attorney General for the State of West Virginia*, 236 U. S. 605-610;

Interstate Amusement Co. v. *Albert*, 239 U. S. 560-567.

We have, therefore, only to consider whether these unfounded assumptions of fact were the basis upon which the State court rested its decision denying the Federal rights asserted by the appellant.

While the recital by the Kentucky court as "outstanding facts" of these assumptions, contrary to the undisputed affirmative proof, would seem to clearly indicate that these assumptions were necessary to the Court's decision, the further discussion of legal principles in the opinion emphasizes the reliance placed by the Court on these assumptions.

At the outset the Court cites and discusses the following cases:

Camden Interstate Ry. Co. v. *Lee*, 27 Ky. L. R. 75;
Harbison Walker R. Co. v. *McFarland*, 156 Ky. 44;
Jennings Neff & Co. v. *Ice Co.*, 128 Tenn. 231;
Grennell v. *Detroit Gas Co.*, 112 Mich. 70;
Altoona v. *Richardson*, 81 Kansas 717;
Hibernia Ins. Co. v. *St. Louis & Northeastern Transportation Co.*, 13 Fed. 516.

In every one of these cases, the purchasing corporation took over all of the assets of the selling corporation and issued stock therefor to the *stockholders of the selling corporation*, and the Court held that the purchasing corporation was responsible for the debts of the seller.

These decisions cited by the Kentucky court are, of course, perfectly sound in principle; but have no application whatever to the instant case. In every one of

these cited cases the sale was fraudulent, actually or constructively, for the reason common to all of them, that the consideration for the sale of all of the assets of the selling corporation *was not paid to the seller, but to its stockholders.*

No consideration moved to the selling corporation which, *ipso facto*, became insolvent. Its assets at the moment of the sale without consideration became a trust fund from which its creditors were entitled to be satisfied before any distribution was made to its shareholders, and the purchasing corporation was held liable for the debts of the seller to the extent of the property received, *not because the stock given in exchange was not proper consideration* for the sale *but because the purchaser distributed the only assets of the insolvent corporation to its shareholders before creditors* having prior claims *were satisfied.* The Kentucky court in its opinion, page says:

> "It is true that there is no direct evidence that the stockholders of the Adams received or will receive in exchange for their stock the stock of the American that was delivered, as shown by the evidence, to the Adams, but it is fair to assume that this stock was turned over to the Adams for distribution to its stockholders as their rights may appear, because they owned the whole beneficial interest in the property that was given for this stock and the clear inference is that the Adams as a corporate entity holds this stock in trust for its shareholders or to be delivered to them."

This utterance of the Kentucky court very plainly shows not only its confessed assumption without eviden-

tiary support of two of the vital facts upon which it based its opinion, but its absolute reliance upon these assumptions in reaching its decision.

Even if we, like the Kentucky court, indulge the assumption that the Adams is a corporation, and even if we go farther and assume that the acquirement by appellant included all of the assets of the Adams of every kind, the law as laid down by this Court and followed in practically every State in the Union is clear upon the non-liability of the appellant for liabilities of the Adams under the proven facts of the instant case. As said by the Court in *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371:

> "A party may deal with a corporation in respect to its property in the same manner as with an individual owner and with no great danger of being held to have received into his possession property burdened with a trust or lien."

And again in *Graham* v. *La Crosse M. R. Co.*, 102 U. S. 148:

> "The contention that while an individual has supreme dominion over his property, a corporation is a mere trustee holding its property for the benefit of its stockholders and creditors is not sound. * * * The corporation is a distinct entity entitled to hold property exactly as an individual can hold it."

See also:

McDonald v. *Williams*, 174 U. S. 397;
Wabash, St. L. & P. R. Co. v. *Ham*, 114 U. S. 587.

The transaction was admittedly without fraud and the consideration contracted for by its subscription and issued by appellant was stock of the appellant, a corporation having $25,000,000 of property and cash, besides the $8,600,000 of property bought from the Adams. To say that this stock was not valid consideration for the property, is to ignore the obvious facts. Upon the authority of the Kentucky cases cited and discussed by the Court below, as well as the uniform decision of this Court and the Courts of every state in the Union, such an exchange would be valid and no lien would attach. The assumption that the consideration for the transfer of the property; i. e., the stock issued by the appellant, was distributed to the stockholders of the Adams at the time of the sale, however, creates another and a very different case, and we do not see that the circumstance of payment being made in stock upon which the Court below lays such stress, has any bearing upon the liability of the appellant. Let us suppose that the consideration had been distributed among the stockholders of the Adams at the time of the sale (as the Court below assumes with respect to the stock) would the appellant have been able, by showing that the sale had been made for cash, to have relieved itself from the charge that it had diverted trust funds of an insolvent corporation in fraud of its creditors? We think it would have no better defense to that charge than it would have if the assumptions of the Court below were the proven fact, and it had distributed the stock to the Adams stockholders.

It would seem, therefore, that the assumption of the distribution of the consideration among the shareholders of the Adams is one of the most important facts

in this case and that the decision of the Kentucky Court rests absolutely upon this assumption.

We frankly admit that if the Adams were a corporation and the appellant had bought all of its property under an agreement to issue its stock to the shareholders of the Adams direct, we would not be here on this appeal. We concede that in such case the distribution to the shareholders would amount to a diversion of trust funds for which we would be liable to the creditors of the Adams to the extent of the property so purchased. But the case apparently considered by the Kentucky Court of Appeals is not the case before this Court. The evidence is clear and competent and without contradiction that there was no such distribution; that the Adams was solvent before and after the sale and is now and has ever since the sale been the owner of the shares of stock received by it for its property, with ample funds outside of such stock to meet all of its liabilities; and finally that it is not and never has been a corporation.

With respect to the second assumption, the Court of Appeals of Kentucky wrongfully assumed that the Commonwealth of Kentucky was a creditor of the Adams Express Company on July 1, 1918. Since the decision was admittedly for the protection of the rights of creditors this was an assumption of the very fact upon which judgment was rendered against the appellant. It should be remembered that the judgments obtained against the Adams Express Company represented fines recovered in prosecutions under a penal statute of the State of Kentucky and *were not recovered until long after the transfer of the Adams property.* While these prosecutions were begun prior to July 1, 1918, they had been allowed to lie dormant until 1921, over two years after the trans-

fer to the American Railway Express Company of the Kentucky property of the Adams Express Company. There is no statute of the State of Kentucky, making such prosecutions a lien on the property of the accused. Under such circumstances we submit that the Commonwealth of Kentucky was not a creditor of the Adams Express Company on July 1, 1918. Even if the petitioner had known of the pendency of these actions, *there was a presumption that the Adams Express Company was not guilty until convicted.* A penal action is a criminal prosecution, *L. & N. R. R.* v. *Commonwealth*, 112 Ky. 635, and it is a well settled rule that the doctrine of *lis pendens* does not bind a transferee where the vendor is the subject of a criminal prosecution, *Farly* v. *Wurz*, 217 N. Y. 105.

> "If the judgment of conviction had been rendered while Russ was the holder of the certificate (Liquor Tax Law 15, subd. 8), a different question would be before us. But a judgment rendered on a plea of guilty after the transfer of the certificate is not evidence against the new holder. As against him, the violation of law must be established by independent evidence. The rule that an estoppel binds privies as well as parties 'applies only to a privity arising after the event out of which the estoppel arises' (*Masten* v. *Olcott*, 101 N. Y. 152, 161; *Zoeller* v. *Riley*, 100 N. Y. 102, 109; *Keokuk & W. R. R. Co.* v. *Missouri*, 152 U. S. 301, 314).
>
> If the equitable doctrine of *lis pendens* is ever applicable to such certificates (*Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616, 629, 630; *Presido County* v. *Noel-Young Bond & Stock Co.*, 212 U. S. 58, 77), this case is not within it. The criminal prosecution was not a litigation directly affecting

> the *res* acquired by the purchaser" (*Zoeller* v. *Riley, supra*; *Green* v. *Rick*, 121 Pa. St. 130, 141; *Houston* v. *Timmerman*, 17 Ore. 499, 505).

Upon the original argument in the instant case it was suggested that the case of *Pierce* v. *United States*, 255 U. S. 398, was a direct authority against appellant's point.

It is true that in that case it was held by this Court that a judgment for a fine imposed upon conviction of the Waters-Pierce Oil Company, on which execution had been issued and returned *nulla bona*, could be recovered against the shareholders of the corporation to whom the assets of the corporation had been distributed several months prior to its conviction. This case, however, hinged upon the construction of Section 1041 of the Revised Statutes that judgments for penalties "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced" and the Court held that the statute was broad enough to support a creditor's bill, and affirmed judgment against the shareholders saying:

> "The law which sends a corporation into the world with the capacity to act imposes upon its assets liability for its acts. The corporation cannot disable itself from responding *by distributing its property among its stockholders and leaving remediless those having valid claims.* In such a case the claims after being reduced to judgments may be satisfied out of the assets in the hands of the stockholders." (Italics ours.)

The Court further, in discussing the contention that the right to bring a creditor's bill did not exist because

the judgment against the company was not entered in the trial Court until a year after the company had divested itself of the property sought to be reached in this suit, and the Government did not become a creditor at all events until its claim for penalties had ripened into a judgment, said:

> "*But when a corporation divests itself of all its assets by distributing them among the stockholders*, those having unsatisfied claims against it may follow the assets, although the claims were contested and unliquidated at the time when the assets were distributed. It is true that the bill to reach and apply the assets distributed among the stockholders cannot, as a matter of equity, jurisdiction and procedure, be filed until the claim has been reduced to judgment and the execution thereon has been returned unsatisfied. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371; but, as a matter of substantive law, the right to follow the distributed assets (see *Railroad Co.* v. *Howard*, 7 Wall. 392, 409; *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482; *Kansas City Southern Ry. Co.* v. *Guardian Trust Co.*, 240 U. S. 166) applies not only to those who are creditors in the commercial sense, but to all who hold unsatisfied claims. A corporation cannot by divesting itself of all property leave remediless the holder of a contingent claim, or the obligee of an executory contract, *Baltimore & Ohio Telegraph Co.* v. *Interstate Telegraph Co.*, 54 Fed. Rep. 50, or the holder of a claim in tort, *Hastings* v. *Drew*, 76 N. Y. 9; *John* v. *Champagne Lumber Co.*, 157 Fed. Rep. 407; and there is no good reason why the United States with a claim for penalties should be in

> a worse plight. Here the stockholders receiving the assets are in the position of volunteers; and there is not even the excuse that they were ignorant of the Government's claim. They were officers of the corporation, and the indictment was pending when the transfer of the assets was made: See *Baltimore & Ohio Telegraph Co.* v. *Interstate Telegraph Co., supra.*" (Italics ours.)

In this case the Waters-Pierce Oil Co. sold all of its assets to the Pierce Oil Company and the proceeds were paid to two trustees for distribution among the shareholders. It will be seen, therefore, that the Waters-Pierce Oil Company by the fact of the sale became insolvent and the sale itself was palpably in fraud of creditors and was a distribution of assets to the shareholders of an insolvent corporation. The shareholders sued were officers of the corporation and had knowledge of the pending contingent claim of the Government for penalties. At the moment of such insolvency a trust attaches for the payment of all creditors before the shareholders receive any of the assets of the insolvent corporation, and the Government pursued these assets in their changed form to satisfy its claim, in preference to following the actual property itself into the hands of the Pierce Oil Company who had agreed to meet the liabilities of the selling corporation. Presumably the Government choose to follow the consideration for the sale into the hands of the shareholders who received it with knowledge of the pending contingent liability, rather than to sue the purchasing corporation who may not have been aware of such contingent liability and whose promise to pay the debts of the corporation may have included only the claims of contract creditors. The

point on which this Court very evidently decided the matter, however, was the fact that the distribution to shareholders was made direct by the purchasing corporation and that the consideration of the sale moved to trustees for the shareholders and not to the corporation itself. Had the case been one in which the purchasing corporation did not specifically or by necessary implication assume the liabilities of the seller, and the consideration of cash and stock in the purchasing corporation been delivered to the selling corporation instead of to its stockholders, the case would then have been on all fours with the instant case, and we venture to say that the Court would not have held the purchasing corporation liable for the penalty in question, but would have said that the remedy of the Government in the recovery of its fine would have been against the selling corporation which was still solvent and able to pay its own liabilities.

With respect to the third assumption, that the Adams Express Company is a corporation, we submit that it involved the very basis upon which the liability of the American Railway Express Company was predicated. The State Court held that the issuance of stock was not a valuable consideration and that therefore the petitioner stands in the position of a donee of the Adams property in Kentucky. However, if this property is to be followed into the hands of a *donee, there must be a trust fund theory*, arising either out of a fraudulent conveyance or the fact that it involves the assets of a *corporation*. Yet this was admittedly not a fraudulent conveyance and it can only be treated as a trust fund under the theory that it concerns corporate assets. As we have seen, it affirmatively appears from the present

record that the Adams Express Company is a joint stock association whose members are unlimitedly liable for its obligations. The statutes of Kentucky which treat it as a corporation, as mentioned in the opinion of the Court of Appeals, are only statutes concerning the manner and basis of taxation. There is no statute of the State of Kentucky which provides for limited liability of the shareholders of the Adams Express Company and such a statute is the only kind which would be relevant to the present issue. If the shareholders of the Adams Express Company were unlimitedly liable for its liabilities in the State of Kentucky—and it affirmatively appears that they were—we submit that its property did not constitute a trust fund for its creditors, so long as it was solvent—that so long as this partnership was solvent it could give its property away, if it so desired, and there would be no liability on the transferee to the creditors of the partnership.

The reason for this distinction is clear upon a moment's analysis. A corporation is a creature of limited liability and the only recourse of its creditors is against its capital stock. It was for this reason that the Courts devised the so-called "trust fund" theory applicable to the capital stock of the corporation, holding that the corporation could not dispose of its capital stock except for a valuable consideration to which its creditors might resort as a substitute for the original capital stock of the corporation. The reason was well pointed out by Mr. Justice Swain of this Court in *Sanger* v. *Upton*, 91 U. S. at page 60, when he said:

> "The capital stock of an incorporated company is a fund set apart for the payment of its debts.

> *It is a substitute for the personal liability which subsists in private copartnerships.* When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security." (Italics ours.)

This case was cited with approval and this excerpt was repeated in full in *County of Morgan* v. *Allen*, 103 U. S. 498, 508, and the doctrine has been continuously reaffirmed by this Court and the highest Courts of various states down to the present time.

If a corporation transfer all or a substantial part of its capital assets without receiving a valuable consideration therefor it deprives its creditors of the only recourse they have for the payment of their claims. However, so long as an individual or partnership remains solvent the gratuitous transfer of a part of its property does not deprive the creditors of their recourse against the full individual liability of the partners. The transfer by a partnership of all or a part of the firm assets did not give the creditors a right at common law to follow such assets, *unless it left the firm insolvent.* In such a case the transfer became a fraudulent conveyance to defeat the rights of creditors and voidable as such. It is this same principle which applies to a gratuitous transfer of all the property of a corporation. Such a transfer

ipso facto renders the corporation insolvent and is voidable as to its creditors. However, this presumption of resulting insolvency which it is proper to make in the case of a gratuitous transfer by a corporation because of the corporate attribute of limited liability, cannot be made in the case of a partnership, because in such case the creditors have recourse against the full personal liability of the individual partners. If the present record justified the assumption that the Adams Express Company was left insolvent by the transfer of the Kentucky property or even if it were bare of evidence one way or the other, the assumption of the Kentucky Court might not be erroneous in result although it is in theory. However, it affirmatively appears from the uncontradicted testimony of its Treasurer and President that since July 1, 1918, it has itself paid claims amounting to several million dollars, and has been solvent at all times, irrespective of the enormous assets owned by its several thousand members, who are each and all individually liable for the association's liabilities. Under these circumstances we maintain that the Adams Express Company could have made an outright gift of the property in Kentucky to any one it saw fit and the donee would take it free and clear of the rights of Kentucky creditors. The assumption by the Kentucky Court that the Adams Express Company was a corporation or creature of limited liability was contrary to the facts of the record and absolutely necessary for the remarkable decision arrived at.

With respect to the fourth assumption that the $8,600,000 par value of the stock of the American Railway Express Company was not valuable consideration for the sale of the property, this of course is a question of

fact, and the record shows that the appellant had approximately $25,000,000 of assets in cash and property of the Southern American and Wells Fargo Express Companies (R., p. 22) in addition to the $8,600,000 value of property bought from the Adams, and since it had not begun business until the sale it could have no liabilities outside of its issued stock.

The requirements of the Director General embodied in the contract for its formation (R., p. 48 *et seq.*) were that "no shares of capital stock shall be issued except on payment therefor at par in cash or its equivalent in property at the fair market value thereof. No evidences of indebtedness except ordinary bank or commercial loans for current purposes shall be made or issued by the new corporation without the prior approval in writing of the Director General *nor shall any lien of any kind be placed by it upon any property of the new corporation without the prior approval in writing by the Director General.*" (Italics ours.)

The assumption, therefore, of the Kentucky court that stock of the appellant was not valuable consideration was an assumption of fact not having any support in the record, and contrary to affirmative proof in the record.

The Court in this assumption has apparently been misled by the decisions of Courts in other cases where insolvent corporations, in the effort to escape liability for their debts turned over all their assets to a new corporation in exchange for its stock, which was in fact worthless. Naturally, the cases holding sales invalid for lack of consideration would be just such cases. Every such case must depend upon the particular facts as to whether the stock had value at all and if so, how much. In this case the proof is that appellant's stock was worth par.

We are unable to find any decision, except that of the Court below, in which it has been held that stock was not valuable consideration for a sale merely because it was stock and not some other thing of value.

To take the property of the American Railway Express Company under a decision rendered on such unfounded assumptions is a lack of due process and contrary to the Constitution of the United States.

POINT II.

The Court of Appeals of Kentucky has attempted to establish by judicial decision a rule which would be unconstitutional if created by statute.

(a) *The judgment of the Court below denies petitioner the equal protection of the law in that it deprives the appellant of its equal right as a creditor of the Adams Express Company and gives a preference to the plaintiff-respondent.*

In the instant case, the Adams Express Company, pursuant to its contract with the Director General (R., p. 48) subscribed to $8,600,000 par value of the capital stock of appellant at par, payable partly in property at its fair market value and partly in cash (R., p. 44). The property agreed to be transferred by the Adams in satisfaction of this subscription included all of the property of the Adams in Kentucky, as well as in other states, used in its domestic express business.

The appellant by virtue of this stock subscription of the Adams became a contract creditor of the Adams and as such was entitled to the equal protection of the law in Kentucky as in other states, in enforcing its claim to the property agreed to be transferred to it by the

Adams in satisfaction of its obligation. Had the Adams refused to transfer its Kentucky property, it seems probable that the appellant might have maintained a bill for specific performance notwithstanding it was largely personal property, because the particular property was unique in character and was indispensable to the carrying out of a balanced contract as an agency of the Government in time of national need. Whether or not this be true, the claim of the appellant to this property was at least equal to the claim of any contract creditor in Kentucky and would seem to be clearly superior to any unliquidated claim in tort.

Even if the respondent, therefore was a creditor of the Adams at the time of the transfer of the said property with a claim upon a parity with that of a simple contract creditor, the utmost that could be said is that the claim of the respondent was equal to the claim of the appellant. The judgment of the Kentucky Court of Appeals, however, gives the claim of the respondent a preference over that of the appellant and therefore deprives the appellant of the equal protection of the law, contrary to rights secured under the Federal Constitution.

As said by this Court in *Blake* v. *McClung*, 172 U. S. 239, at page 253:

> "If a State should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that State over the claims of individual creditors, citizens of other States, such legislation would be repugnant to the Constitution upon the ground that it withheld from citizens

of other States as such, and because they were such, privileges granted to citizens of the State enacting it. Can a different principle apply, as between individual citizens of the several States, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business and having the power to contract with citizens residing in States other than the one in which it is located?

It is an established rule of equity that when a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors, *Graham* v. *Railroad Co.*, 102 U. S. 148, 161—not simply of stockholders and creditors residing in a particular State, but all stockholders and creditors of whatever State they may be citizens. * * * In *Hollins* v. *Briarfield Coal & Iron Co.*, 150 U. S. 371, 385, it was observed that a private corporation, when it becomes insolvent, holds its assets subject to somewhat the same kind of equitable lien and trust in favor of its creditors that exists in favor of the creditors of a partnership after becoming insolvent, and that in such case a lien and trust will be enforced by a court of equity in favor of creditors. These principles obtain, no doubt, in Tennessee, and will be applied by its courts in all appropriate cases between citizens of that State, without making any distinction *between them*. Yet the courts of that State are forbidden, by the statute in question, to recognize the right in equity of citizens residing in other States to participate upon terms of equality with citizens of Tennessee in the distribution of the assets of an insolvent foreign corporation lawfully doing business in that State.

> We hold such discrimination against citizens of other States to be repugnant to the second section of the Fourth Article of the Constitution of the United States, although generally speaking, the State has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several States by the supreme law of the land. Indeed, all the powers possessed by a State must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States."

While it is true that in the case cited, a foreign corporation was denied relief upon the claim that it was deprived of the equal protection of the law, the decision of the Court in respect to this question was based solely upon the ground that the foreign corporation in question was not within the jurisdiction of the State of Tennessee, the validity of whose statute was under discussion, because it was not doing business in that State and was not subject to process in that State.

The clear inference from the decision of the Court and the language used in the discussion at page 261 was that if the Virginia corporation had been doing business within the State of Tennessee, the discrimination against it would have constituted a denial of equal protection of the law.

In this case there is no such difficulty, since the appellant is not only within the jurisdiction of the State of Kentucky by the fact that it did business in that State, but was served with process in the instant case and therefore must be held to have been within the jurisdiction of the Courts of Kentucky.

There are, however, in the instant case, two facts which make the discrimination of the Court below more aggravated. First, the contract of the Adams had been carried out and the property had been transferred to the appellant nearly three years before the respondent sought to establish its claim. Second, the respondent did not secure a conviction of the Adams in the criminal proceedings until more than two years after the transfer of said property and was, therefore, not a creditor of the Adams in any sense at the time of the transfer. If, therefore, as indicated by the decision of this Court in *Blake* v. *McClung*, *supra*, the statute of the State of Kentucky would have been obnoxious to the Federal Constitution, it must clearly appear that the State of Kentucky cannot through any other agency exercise a greater authority than it could through its legislative branch, and that its judgment denies to appellant the equal protection of the law in violation of the Federal Constitution.

> (b) *The decision denies petitioner the equal protection of the law, in so far as it makes a distinction between payment in cash and a bona fide issue of stock.*

Even if we regard the transaction between the appellant and the Adams from the angle of a mere purchase of the property of the latter paid for in the stock of the former without regard to the fact that the appellant stood at the time of the contract of sale in the position of a creditor of the Adams, the judgment of the Kentucky court must, we think, be held to deny petitioner the equal protection of the law.

The conclusion reached by the Kentucky Court of Appeals was that the issuance of stock in exchange for

property is not a valuable consideration so far as the creditors of the original owner of the property are concerned but that if the petitioner had paid cash for the property acquired, it would have been a *bona fide* holder for value and the creditors of the Adams could not have followed the property into the petitioner's hands. Such a conclusion requires the assumption that a trust fund theory is applicable to the property transferred so that the creditors can follow the property into the hands of a *bona fide* donee. However, let us assume for the sake of the argument in this point, that the property of a solvent individual or partnership, segregated in a particular State, is a trust fund for the benefit of his or its creditors in that State, and that these creditors can follow this property into the hands of a *bona fide* donee, even if the individual or firm debtor possesses ample property in other States to satisfy all creditor's claims.

Even under such an assumption, to treat a corporation which pays cash for property as a *bona fide* holder for value, and a corporation which issues its own stock (but less than a controlling interest) as a donee, denies to the latter corporation the equal protection of the laws. If there is no reasonable ground for a distinction between the payment of cash and the *bona fide* issuance of stock (but less than a controlling interest) in exchange for property, the distinction made by the Kentucky Court of Appeals was a denial of the equal protection of the laws. We contend that there is no reasonable distinction between the two under the circumstances of the present case. The circumstances relied on are——

(1) Less than 1/3 of 1% of the total issued stock of the American Railway Express Company

was issued to the Adams Express Company for the property in Kentucky.

(2) 75% of the total amount of stock issued was issued for property equivalent to the full par value, acquired from firms having no connection with the Adams Express Company.

(3) At no time before or after the transfer did the Adams Express Company or the persons controlling it, also control the American Railway Express Company.

(4) There was admittedly no fraudulent intent on the part of any person or corporation to defeat the rights of creditors of the Adams Express Company.

The Court of Appeals practically took the position that the issue of stock by a corporation in exchange for property is a "badge of fraud." While it cited some cases in support of this proposition, it did not reach this conclusion by an analysis of the principles upon which the cases were decided, but rather by examining the facts common to all such cases and seizing upon the common fact of the issuance of stock as the underlying principle of decision. There is perhaps no more prolific source of judicial and scientific error than the so-called selective method of attempting to discover the cause which produces a given effect. Having diagnosed the decisions cited as based on the fact of the issue of stock the Court then proceeded to cast about for additional grounds to bolster up and justify the diagnosis. It is well worth while to stop to examine into the validity of these grounds, because they are mentioned in one or two of the cases cited in the opinion of the State court.

One of these was that the creditors of the seller should not be compelled to look to the stock acquired by their debtor for the satisfaction of their claims, because it would be hard to realize on. However, there is no proof that the stock of the American Railway Express Company did not have an easily ascertained market value. Let us suppose that the consideration for the purchase by the American Railway Express Company had been the delivery to the Adams Express Company of full paid U. S. Steel Co. stock. Could it be contended that this would not have been a valuable consideration? The same objection would be applicable if the petitioner had exchanged real property located in the State of New York for the Kentucky property of the Adams, yet can it be doubted that such a consideration would be a valuable one?

Then the Kentucky court asserted that it would not compel its residents to look outside the State for the satisfaction of their claims against the Adams Express Company. But such an argument would apply with equal validity to a case where the American Railway Express Company paid for the property acquired in cash which was delivered and retained in New York. Yet the Kentucky court admits that if the payment had been made in cash the American Railway Express Company would take the property free and clear of the claims of all creditors in Kentucky.

Neither of these grounds applies with any greater force to the case of a stock issue than they do to a cash payment, and it is clear that we must examine the reasoning of the cases cited by the Kentucky court to test the validity of its conclusion.

We submit that all the cases cited by the Kentucky

court and all the other cases ever decided on the same point have one fact in common, in addition to the mere fact of a stock issue; *i. e., that the purchasing corporation was controlled after the sale by practically the same persons who had controlled the seller.*

It is this fact of practical and actual identity between seller and buyer that has caused the courts in such cases to disregard the sale where the rights of creditors were concerned. Such sales were not *bona fide* because the new corporation was merely the debtor under another guise. In all of the cases cited in the State Court's opinion the stockholders of the selling corporation were practically identical with those of the buying corporation. In most of these cases the stock of the purchasing corporation was distributed directly among the stockholders of the selling corporation. In most of them the transaction is designated as practically a consolidation or merger, which is only another manner of saying that there is identity of control.

The decisions of this Court are very instructive on this point. In *Linn Timber Co.* v. *U. S.*, 236 U. S. 574, land was conveyed to a corporation in exchange for practically all its capital stock and the Government thereafter brought suit to avoid the title on the ground that the vendor's title was fraudulently obtained. One might have expected this Court, if the rule laid down by the Kentucky Court of Appeals, is sound, to set aside the transfer to the company on the simple ground that the issuance of its stock was not a valuable consideration. However, not a word was said to this effect and no intimation given that the Court so thought. The decision was based on the fact that the corporation was but the *alter ego* of the transferror—that they were identical.

On the same ground the transfer was set aside in *McCaskill Co.* v. *U. S.*, 216 U. S. 504 and in *Wilson Coal Co.* v. *U. S.*, 188 Fed. 545. In neither of these cases was there an intimation that the stock issued was not a valuable consideration. In both of them it was the fact of identity between transferror and the transferee that caused the property to be followed into the corporation's hands. An analysis of these opinions clearly indicates that if there had been no identity between the transferror and transferee the corporation's title to the property would have been unassailable.

A simple illustration will serve to test the validity of the proposition that the issuance of stock is not a valuable consideration for the transfer of property. Let us assume that an individual holds certain personal property subject to a secret trust and that he subscribes for capital stock of a newly organized corporation of the par value of the property held in trust. It is assumed that the stock interest so acquired by the trustee is less than a controlling interest in the stock of the corporation, in fact less than 1%, and that the remainder of the capital stock of the corporation is issued to other persons for cash or property equal to the par value of such stock. Under such circumstances could the beneficiary of the secret trust follow the property into the hands of the corporation? We submit that it could not, that the corporation would in such case be a *bona fide* holder for value, and that at most the beneficiary of the secret trust could only treat the stock acquired by the trustee as a substitute for the original trust property. It may be urged that this illustration is not in point because in the present case the Kentucky court held that the petitioner *should have known* that there were probably un-

paid creditors of the Adams, while the illustration concerns a case where the purchasing corporation could not have known that the property constituted a trust fund. However, this distinction does not affect the question of what constitutes a valuable consideration—it bears on the question as to when a transferee is a *bona fide* holder. If the transferee takes from the trustee with notice of the trust, it does not matter how valuable is the consideration paid—the transfer can be avoided at the instance of the beneficiary. For this reason a transfer to a corporation in exchange for a controlling interest in its stock would be voidable, not because the consideration was the issuance of stock, but because the transferee and the transferror are in fact identical.

The true reason for holding that a corporation, which acquires all the assets of another corporation in exchange for the stock of the new corporation, is not a *bona fide* purchaser for value, is not, as some Courts have said, because the stock is not a valuable consideration, but because the new corporation is not a *bona fide* purchaser.

Where there is no legal or practical identity between seller and buyer, the buyer must be regarded as a *bona fide* purchaser in the absence of actual fraud. The fact that a stock issue is present in all the cases holding the purchasing corporation liable is due to the fact that this is the only method of control in the case of a corporation. To say that the American Railway Express Company did not give a valuable consideration to the Adams Express Company when it issued its stock is contrary to both common law and common sense. Without regard to the value of the Kentucky property acquired by the American Railway Express Company from the Adams, this stock had a book value of at least $99.60 per share

on account of property transferred to the American Railway Express Company, other than that belonging to the Adams in Kentucky. In addition to this book value this stock represented a proportionate interest in the franchise and goodwill which must be deemed to be of very considerable value, because the company had the exclusive right to do an express business over practically all the railroad lines of the United States.

The Kentucky court admits that in the present case the property of the Adams could not have been followed if it had been paid for in cash, and thereby it admits what is the actual fact, that there is no such identity between the petitioner, American Railway Express Company, and the Adams as to put the petitioner in the position of a purchaser with notice. *If the Kentucky court had found that the Adams and the petitioner were identical* or if it had held that the transfer of the property was voidable as to creditors, as a diversion of a trust fund, whether it was paid for in cash or stock, we could not assail it as discriminatory and a denial to petitioner of equal protection of the laws. However, when it laid down the rule that the transfer would be immune from attack if the consideration were cash, but subject to attack, if it were stock, we submit that since there is no reasonable ground for a distinction between the two under the facts of the present case, there is a discrimination against the petitioner and a denial of the equal protection of the laws. Could a decision of a State court, in effect setting aside a transfer to a corporation on the ground that it was paid for in $10 bills be supported if it were announced that the transfer would have been proper if paid for in $1 bills? Yet no more valid distinction in principle can be pointed out between payment

in cash or property and issuance of stock (unaccompanied by a controlling interest).

Moreover, it is apparent that the decision of the State Court denies to petitioners the equal protection of the laws in so far as it distinguishes between a purchase by a corporation and a purchase by an individual. For instance, if John Jones, owning $10,000 par value of American Railway Express Company stock, had delivered it to the Adams Express Company in exchange for its Kentucky property, it does not appear under the decision of the Kentucky Court, that the transaction would have been subject to attack by the Kentucky creditors of the Adams Express Company. But, if the American Railway Express Company issues this amount of stock to the Adams Express Company for the same property, it renders itself liable to the Adams Express Company creditors. Such a distinction has no support in either reason or law. It only illustrates in another form the discriminatory effect and actual injustice of the Kentucky Court's decision.

If the rule announced by the Kentucky Court of Appeals would have been unconstitutional as a statute, it seems clear that this Court can review it if its effect is to deny to petitioner the equal protection of the laws or deprive him of property without due process of law.

Prudential Ins. Co. v. *Cheek*, 259 U. S. 529:

> "It seems to us clear that the state might without conflict with the 14th Amendment, enact through its legislative department a statute precisely to the same effect as the rule of law and public policy declared by its court of last resort. And, for the purposes of our jurisdiction, it makes

> no difference under the Amendment, through what department the state has acted. The decision is as valid as a statute would be. No question of 'equal protection' is raised here."

(c) *The decision deprives petitioner of its property without due process of law by imposing harsh and unreasonable restriction on the acquisition of property.*

For the purpose of argument under this point we shall assume the validity of principle to which we referred in the preceding paragraphs, *i. e.*, that the *bona fide* issue of stock by a corporation in exchange for property is as much a valuable consideration as the payment of cash or property.

The question is then whether a state can enact a rule that where a corporation purchases property, which happens to be all the property belonging to the seller in a particular state, this corporation is liable to the seller's creditors in that state.

Such a rule is on its face a drastic one, but it is the effect of the Kentucky Court's decision, if we do not discriminate between a *bona fide* stock issue and a cash payment. As a matter of fact, unless there is a reasonable basis for distinction the rule must be deemed to apply to individual purchasers as well as Corporations. The real question for decision is, therefore, whether a sale of all the assets within a particular state of a solvent partnership can be made void as to creditors of the partnership, either by statute or judicial decision.

There are no cases directly in point because up to the present case, no state had attempted to create such a rule of law. This in itself is some support for the conclusion that it is a harsh and unreasonable rule.

However, considerable light on the principles involved can be obtained by an examination of the decisions of this Court with reference to the constitutionality of the "Bulk Sales Laws" enacted by many states.

These laws apply to circumstances which have some elements in common with the present case. They apply to instances where the vendor is disposing of an entire stock in trade, presumably the only assets in the state to which his creditors can look for satisfaction of their claims, and the purchaser may be in actual fact a *bona fide* purchaser for value. In these respects they resemble the present case. However, all such laws provide a method by which the purchaser can take a good title to the goods. In some the requirement is the filing of a statement with the town clerk, in others it involves a demand for a list of creditors and mailing of notices to them. When these formalities are complied with the purchaser can take the goods free of any claims of the seller's creditors. However, the rule in the present case provides no method by which the purchasing corporation can acquire a clear title to the property transferred.

These "Bulk Sales Laws" spring from the same commendable desire to protect the rights of creditors which underlies the decision of the Court in this case. We have no quarrel with the motive which creates such statutes or decisions but even a commendable motive cannot justify a wrong action. There are other rights beside those of creditors and the rights of an innocent purchaser for value rank at least as high, if not higher, than those of the vendor's creditors. Such rights may be qualified, *within reason*, as has been done in the "Bulk Sales Acts," but we do not believe they can be wiped out altogether. The state may prescribe regulations to be

complied with in the transfer of all the property of a vendor, such as notices to creditors, filing of inventories, etc., but no state has hitherto gone so far as to hold that all transfers of all the property of the vendor are void as to his creditors irrespective of the transferor's solvency. This Court has upheld "Bulk Sales Acts" which provided for reasonable formalities in connection with the transfer of a vendor's property in bulk but its opinions have clearly indicated that there could be such a thing as an unreasonable restriction. The decisions have held the statutes in question to be within the reasonable exercise of the police power of the state rather than a matter absolutely within the state's control, over the exercise of which this Court had no power of supervision.

In the case of *Lemieux* v. *Young, Trustee*, 211 U. S. 489, in holding the Connecticut Bulk Sales Law constitutional, this Court said:

> "As the subject to which the statute relates was clearly within the police powers of the State, the statute cannot be held to be repugnant to the due process clause of the Fourteenth Amendment, because of the nature or character of the regulations which the statute embodies, unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. *Booth* v. *Illinois*, 184 U. S. 425. This, we think, is clearly not the case. So, also, as the statute makes a classification based upon a reasonable distinction, and one which, as we have seen, has been generally applied in the exertion of the police power over the subject, there is no foundation for the proposition that the

result of the enforcement of the statute will be to deny the equal protection or the laws."

In the case of *Kidd, Dater & Price Co.* v. *Musselman Grocer Co.*, 217 U. S. 472, this Court quoted the excerpt set out above, saying:

"These principles are decisive against the contentions made in this case, as we do not find in the provisions of the Michigan statute when compared with the Connecticut statute such differences as would warrant us in holding that the regulations of the Michigan statute are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. The purpose of both statutes is the same, viz., to prevent the defrauding of creditors by the secret sale of substantially all of a merchant's stock of goods in bulk, and both require notice of such sale and make void as to creditors a sale without notice. The difference between the two statutes are pointed out by counsel in a summary which we excerpt in the margin.

It is apparent, we think, from this summary that the statutes are alike fundamentally, and differ only in minor and incidental provisions. In some respects the Michigan law is more comprehensive than the Connecticut law, as the latter law was limited to retail merchants, while the Michigan law affects wholesalers as well as retailers. The requirements of the Michigan law, that a full and detailed inventory shall be made, does not seem to us to be oppressive and arbitrary, as in *bona fide* purchasers of stocks of goods in bulk a careful purchaser is solicitous to demand such an inventory, and in the purchase

in question an inventory was in fact made. Nor can we say, in view of the ruling in the *Lemieux* case, to the effect that a State may without violating the Constitution of the United States, require that creditors be constructively notified of the proposed sale of a stock of goods in bulk, that a requirement for what is in effect actual notice to each creditor is so unreasonable as to be a mere arbitrary exertion of power beyond the authority of the legislature to exert. We do not deem it necessary to further pursue the subject, as we think it clearly results, from the ruling in *Lemieux* v. *Young*, that the Michigan statute in no way offends against the Constitution of the United States, and therefore that the Court below was right."

As we have seen, the rule laid down in the present case provides for no method for validating the sale. No way is suggested in which the American Railway Express Company could have acquired a good title as against creditors of the Adams, so long as it was stock issued in exchange for the property. The Court does not intimate that it would have altered the situation if the American Railway Express Company had taken a list of the Adams creditors or given notice of the sale to all of them. There is no suggestion on the record that the transaction could have been prevented by the creditors if they had been so informed. Certainly the present plaintiff, as the prosecutor of a pending penal action would have had no grounds for interference. It was admittedly a fair sale, in which the best possible price for the property was obtained. It left the Adams with more to pay its debts than it would have had if the

property had been disposed of piece by piece wherever it happened to be located. Without entering into a discussion of the merits of the plaintiff's claim, it is safe to say that it is not the fault of the petitioner that the Adams has declined to pay some of its alleged creditors.

We submit, therefore, that an attempt on the part of the state to enact by statute the rule that wherever a solvent individual, partnership or corporation sells all of its property located in a particular state to an individual or corporation, the buyer, *ipso facto*, takes such property subject to the claims of the seller's creditors in that state, is so arbitrary and unjust an exercise of the sovereign power of the state as to be a lack of due process of law. This is clearly so in the present case where the purchaser gave full value for the property acquired, the seller remained perfectly solvent and its creditors had their remedy by resort to the debtor's property located in other states—in other words, for the convenience of Kentucky creditors there is arbitrarily imposed upon a *bona fide* purchaser for value liability to Kentucky creditors of the vendor.

POINT III.

Even if the State Legislature could properly enact such a statute, the decision of the State Court is not based upon the principles of common law, but is an attempt at judicial legislation under the police powers of the State, which cannot be applied retroactively to affect vested rights.

(a) *This Court is not bound by the decision of the State Court as to the rules of common law applicable to the present case.*

It should be noted that the decision of the State Court is not based on any statute or constitutional provision of the State of Kentucky and no statutes are cited in its support. Presumably, therefore, it must depend for support upon the principles of common law. However, in the present case, there is no peculiar reason for this Court to defer to the decision of the Kentucky court as to the common law. It is the duty of the Federal courts to determine for themselves questions of commercial law, of general jurisprudence and of rights under the Constitution of the United States.

Swift v. *Tyson*, 16 Pet. 1;
Carpenter v. *Prov. Ins. Co.*, 16 Pet. 495;
Mutual L. Ins. Co. v. *Lane*, 151 Fed. 280, 281, 157 Fed. 1002;
H. Scherer & Co. v. *Everest*, 168 Fed. 822, 832;
Johnson v. *Charles D. Norton Co.*, 159 Fed. 361;
Guernsey v. *Imperial Bank*, 188 Fed. 300-302;
Independent School Dist. v. *Rew*, 111 Fed. 11, and cases cited;
Oates v. *First Nat. Bank*, 100 U. S. 246;
Cudahy Packing Co. v. *State Nat. Bank*, 134 Fed. 538;
First Nat. Bank v. *Liewer*, 187 Fed. 16.

Even if the decision of the Kentucky Court were to be held to have created a fixed rule of property in the State of Kentucky, the decision was made after the rights of the parties had accrued and is not controlling

on the Federal Courts. It is their duty to exercise their independent judgment as to what the common law is.

Great Southern Fire Proof Hotel Co. v. *Jones*, 193 U. S. 532;

Shaw v. *Cleveland, C. C. & St. L. R. Co.*, 173 Fed. 750;

Brewer-Elliott Oil & Gas Co. v. *United States*, 270 Fed. 104;

Babbitt v. *Read*, 236 Fed. 49;

United States ex rel. Pierce v. *Cargill*, 263 Fed. 857;

Newbern v. *National Bank*, 234 Fed. 209.

To make the decisions of the State Court obligatory on the Federal courts, the right must have accrued after the rule has been established.

Shaw v. *Cleveland C. C. & St. L. R. Co.*, 173 Fed. 746;

Adelbert College v. *Wabash R. Co.*, 171 Fed. 813;

Jones v. *Great Southern Fireproof Hotel Co.*, 193 U. S. 532;

Kuhn v. *Fairmont Coal Co.*, 215 U. S. 349;

Hartford County v. *Tome*, 153 Fed. 81;

Fleischmann Co. v. *Murray*, 161 Fed. 162;

Murray v. *Wilson Distillery Co.*, 213 U. S. 151.

In the present case the rule of law established by the Court of Appeals of Kentucky was new, not only to the State of Kentucky, but to the previously enunciated principles of the common law. The rule had previously

been established in Kentucky, where a corporation transferred *all its property* to another corporation in exchange for stock of the new corporation and after such transfer the new corporation was controlled by the persons who had controlled the old corporation, or the stock received was distributed among the stockholders of the old corporation, that the new corporation was liable for the debts of the old, at least to the extent of the property acquired. However, the rule established in the present case extends the imposition of liability to an extent never previously dreamed of. In this case the vendor was a joint stock association whose members are unlimitedly liable for its obligation, the property transferred in Kentucky was less than 1% and all the property transferred was less than 20 per cent. of the total assets of the association; the business transferred was only one branch of that conducted by the association; the stock interest acquired in the new corporation was less than one-third of the issued stock; the persons in control of the association did not control the new corporation; there was no dissolution of the association and the stock received was not distributed among its members; the association thereafter remained in existence and engaged in another line of business for profit.

The old rule laid down by the Kentucky courts held that all the capital assets of a corporation were a trust fund for the benefit of creditors. The new rule asserts that that portion of the assets of a joint stock association located within the State of Kentucky, is, as such, a trust fund for the benefit of Kentucky creditors of the association.

The old rule was applied because of identity of control or the fact of dissolution of the old corporation or

the distribution of the proceeds. The new rule holds that it is immaterial whether or not there is identity of control or the vendor remains in business, or whether or not the proceeds of the sale are distributed among the shareholders of the vendor. The only material thing in the view of the new rule is that it is *stock* of the new corporation which is issued in exchange for the property transferred. Whether or not the new rule is the logical extension of the old one, it is still clear that *it is a new rule.* No one could have known under the old rule that the present transaction would have made the American Railway Express Company liable for the obligations of the Adams. Can it be said that the new rule is self-evidently included in the old one, when the Supreme Court of North Carolina has held on a similar record that the old rule does not apply to this case? *McAllister* v. *American Railway Express Co.*, 103 S. E. 129. Even if it can be held to be a rule of property, the rule laid down by the Kentucky Court is a new one, it was rendered after rights had vested in the present case and therefore is not controlling on this Court, which can determine for itself whether or not the decision is justifiable under the well established principles of the Common Law.

(b) *The decision of the State Court cannot be justified under the principles of common law.*

The general rule is that a corporation which purchases all the property of another corporation is not *ipso facto* liable for the debts of the latter.

Postal Telegraph Co. v. *Newport*, 247 U. S. 464;

Gray v. *National Steamship Co.*, 115 U. S. 116;

Racine, etc. Co. v. *Confectioners' Mfg. Co.*, 234 Fed. 876;
Koch v. *Speedwell*, 140 Pac. 598 (Cal.);
Buckler v. *United States, etc. Co.*, 112 Atl. 632 (Pa.);
Hageman v. *Southern R. R. Co.*, 202 Mo. 249;
McAllister v. *American Ry. Express Co.*, 103 S. E. 129 (N. C.);
Swing v. *Empire Lumber Co.*, 105 Minn. 356;
Fogg v. *Blair*, 133 U. S. 534, 541;
Cook on Corporations, 8th Ed. Vol. III, Sec. 673;
Chase v. *Michigan*, 121 Mich. 631;
Austin Co. v. *Smith*, 138 Ga. 651;
Houston v. *Nicolini*, 96 S. W. 84 (Tex.).

Some states have held that there is an exception to this general rule where a corporation transfers *all its property* to another corporation in exchange for *a controlling interest in the stock* of the new corporation and the selling corporation is dissolved or goes out of business. Such were the facts in the cases cited in the opinion of the Kentucky Court of Appeals. The validity of this exception is disputed by very reputable authority:

Hageman v. *Southern Ry.*, 202 Mo. 249;
Swing v. *Empire Lumber Co.*, 105 Minn. 356;
Anderson v. *War*, 8 Idaho, 789;
Ozan L. Co. v. *Davis, etc., Co.*, 284 Fed. 161;
Colorado Springs Co. v. *Albrecht*, 123 Pac. 957;
McAllister v. *Am. Ry. Ex. Co.*, 103 S. E. 129 (N. C.);

Cooper v. *Utah Ry. Co.*, 35 Utah 570;
Homestead Mining Co. v. *Reynolds*, 30 Colorado 330;
Lamkin v. *Baldwin*, 72 Conn. 57.

However, we submit that prior to the decision of this case no court has ever held that the sale of a *small portion of the total assets* of a corporation, which happened to be all the assets of that corporation within a particular state, in exchange for a *minority interest* in the stock of another corporation, makes the purchaser liable to the seller's creditors in that state. Yet such is the abstract principle of law laid down by the Kentucky Court. Such, we say, is the *abstract principle*, because, as applied to the actual facts of the present case, the rule laid down, in effect, was this—that where a corporation purchases from an *admittedly solvent partnership*, having property scattered throughout the United States such portion of its property as happened to be located within the State of Kentucky, issuing in exchange therefore approximately 1/3 of 1% of its issued capital stock, the corporation is liable to the State of Kentucky for the penal liabilities of the partnership to the extent of the property acquired, although there may be no actual identity of any kind between the partnership and corporation. There is very considerable authority for the proposition that even where an *insolvent* partnership turns *all* its assets over to a corporation for a *controlling* interest in the stock of the corporation and goes out of business the partnership creditors cannot set aside the transfer, although they may go against the stock acquired.

Plaut v. *Billings Drew Co.*, 127 Mich. 11;
Re Braus, 248 Fed. 55;

Shumaker v. *Davidson*, 116 Iowa, 569;
Harnan v. *Haight*, 177 N. W. 281 (Mich.);
Fisher v. *Campbell*, 101 Fed. 156;
Troy v. *Morse*, 22 Wash. 280;
Gardiner v. *Haines*, 19 S. D. 514;
Haring v. *Hamilton*, 107 Wis. 112;
Scripps v. *Crawford*, 123 Mich. 172;
Evans v. *Johnson*, 149 Fed. 978.

However, in the present case the partnership is admittedly *solvent*, the assets in the State of Kentucky were only a small portion of the entire assets of the Adams, *no controlling interest was acquired* in the stock of the American Railway Express Company and the Adams remained in existence and is still engaged in business (Record, p. 75). The decision of the Kentucky Court was not necessary to preserve the rights of Adams creditors who had exhausted every other remedy in an effort to collect, but merely *for the convenience of Kentucky creditors.* There must have been countless instances where local creditors would have preferred for their own convenience to satisfy their claims against a non-resident debtor out of property formerly belonging to it, but we have been unable to find a single case that laid down the remarkable rule of this case. The decision is clearly contrary to the fundamental common law and if justifiable at all, must be based upon the right of a state to enact special laws for the protection of its own citizens.

(c) *The decision of the State Court is an attempt at judicial legislation under the State's police power.*

As we have said before, the decision of the Court of

Appeals was not necessary to preserve to a creditor a right of recourse, without which he would have been absolutely unable to *get satisfaction of his claim.* It is not disputed that service could be obtained against the Adams in other jurisdictions than Kentucky or that the Adams was perfectly solvent and able to meet all claims against it. The decision was rendered for the convenience of Kentucky creditors.

It seems clear that the Kentucky Court was actually attempting a piece of judicial legislation on the theory that it was a permissible exercise of the State's police power. It is true that at common law all the capital assets of a corporation constituted a trust fund for the benefit of all the creditors of the corporation, but there was no basis at common law for segregating the assets within a particular state and treating them as a trust fund for the benefit of creditors residing in that State. Yet this is the precise rule announced by the Court of Appeals of Kentucky, and it gives rise to some interesting questions. If it is permissible for a state court of general jurisdiction to treat firm assets within the State as a trust fund for resident creditors, could a local court whose jurisdiction is limited to a municipality, treat such assets within the municipality as a trust fund for the benefit of creditors residing within that municipality? It seems a far stretch to justify such decisions under the common law, irrespective of how justifiable they might be as statutes enacted for the protection of the State's residents.

It seems to us debatable as to whether or not the courts of a State can take into their own hands the enactment of rules deemed to be within the proper limits of the State's police power and we are inclined to believe

that the decision of a court must rest either upon the general principles of common law or upon specific statutes of the State or Federal Government. In other words, the decision of a State court cannot be justified as within the police power of the State when it is admittedly contrary to the principles of the common law, and is not rendered under a State statute enacted under the State's police power. A rather exhaustive search has failed to disclose any decision of a State court which is supported upon this ground.

For instance, could a State court, without any action on the part of the State Legislature, announce the rule that foreign corporations could not sue on contracts made within the State unless they had complied with the technical requirements necessary to domicile them in the State? Could a State court hold that an employe, injured in the performance of his duties, was entitled to compensation, irrespective of whether or not there was any negligence on the part of the employer, in the absence of a legislative enactment of a Workmen's Compensation Law? Could a State court in the absence of a legislative enactment of a Bulk Sales Law hold that the sale of an entire stock of merchandise to a *bona fide* purchaser for value was void as to the seller's creditors, unless certain specified technicalities were complied with? At the most, such clear cases of judicial legislation would be of doubtful validity.

(d) *A statute or rule of judicial decision based only on the State's police power cannot retroactively affect rested rights acquired before the enactment of the rule.*

For the purpose of argument under this point, it is quite immaterial whether or not the State of Kentucky could *in the exercise of its police power* adopt a rule of

law either by judicial decision or statute of the same general purport as the decision sought to be reviewed. If it could not do so, no further argument is necessary to show that the decision is unconstitutional. If it could do so, the rule adopted could not be classed as a part of the common law, but would be an exercise of the sovereign power of the State for the benefit of its citizens.

Even if it be assumed that the Kentucky Court can enact rules of law under the police power it seems clear that such rules will be subject to the same limitations as a statute of similar purport. A State cannot accomplish by judicial decision what it could not accomplish by legislative enactment. One of the principal limitations on the police power is that which prevents the destruction of vested property rights. Let us assume for the sake of argument under this point that at common law the American Railway Express Company would not have been liable for the obligations of the Adams Express Company under the facts of this case—that at common law it would acquire the property of the Adams Express Company free and clear of the claims of any creditors of the Adams Express Company. Then let us assume that on December 10, 1920, the legislature of Kentucky had passed a statute providing that under such circumstances the purchasing corporation should acquire the property subject to a lien in favor of the creditors of the vendor, and that it had been attempted to apply this statute to the acquisition by the American Railway Express Company of the Adams property on July 1, 1918. Can it be doubted that under such circumstances it would be held that the American Railway Express Company had a vested right in the property acquired from the Adams Express Company which the subsequent statute

could not constitutionally impair? It is difficult to see how one could have a stronger case of a vested right of property, which this Court has repeatedly held cannot be impaired by subsequent legislation, even under the admitted police power of the State.

Let us suppose that a State were to enact a "Bulk Sales Law" requiring the purchaser to go through certain formalities in order to take the property free from the claims of the seller's creditors. Could this law be retroactively applied to make void sales effected prior to the passage of the Act? Yet, that is precisely the effect of the Kentucky Court's decision.

The amendment of February 17, 1922, to Section 237 of the Judicial Code clearly indicates that a change in a rule of law established in a State by judicial decision may violate the constitutional rights of a party.

> "In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law, or construction of Statutes by the highest court of a State would be repugnant to the Constitution of the United States, the Supreme Court shall upon writ of error remand, reverse, or affirm the judgment of the State Court, if such claim is set up in the case before the final judgment is entered in the State Court and the decision is *against* the claim so made."

While this amendment, *permitting a writ of error* to this Court, applies only to cases involving the validity of a contract, it recognizes the fact that rights may become vested under one rule of law as laid down by the highest courts of a State and that a change in such a rule of law may be repugnant to the federal constitution.

It is true that the present case does not directly involve the validity of a contract, and so resort to this Court cannot be had upon a writ of error, but it does involve the destruction of vested rights due to a change in the rule of law by the highest court of Kentucky and as such this Court may review it on a writ of certiorari.

POINT IV.

The judgment of the Court of Appeals of Kentucky should be reversed and bill of the plaintiff-respondent should be dismissed.

CHARLES W. STOCKTON,
Attorney for Defendant-Appellant.

BRANCH P. KERFOOT,
Of Counsel.

Appendix.

COURT OF APPEALS OF KENTUCKY

December 10, 1920

AMERICAN RAILWAY EXPRESS COMPANY,
Appellant,

—against—

COMMONWEALTH OF KENTUCKY,
Appellee.

Appeal from Harlan Circuit Court.

Opinion of the Court by Chief Justice Carroll, Affirming:

The purpose of this suit which was brought in July, 1919, by the Commonwealth of Kentucky was to make the American Railway Express Company liable for certain judgments amounting in round numbers to $4,000 obtained by the Commonwealth against The Adams Express Company in the Harlan Circuit Court. The lower Court gave judgment for the amount asked against the American Railway Express Company and to have a reversal of that judgment it prosecutes this appeal.

There is no question made in the record or in the briefs of counsel for the American company as it will be called, as to the regularity of the proceedings in which the judgments were rendered against the Adams company or as to the validity of the judgments against it. The reversal is asked upon the sole ground that under the facts and circumstances of the case, the American company should not be made liable for the payment of the judgments against the Adams company.

Nor is there any disputed issue of fact appearing in the record and this being so the correctness of the judgment appealed from must depend on the principles of law applicable to the case. Before, however, coming to consider the questions of law it will be necessary to set forth the material parts of the pleadings in the case as well as so much of the evidence as shows the circumstances under which the American company acquired the business and property of the Adams company.

The suit was brought by the Commonwealth against the Adams company and the American company and after setting up the judgments against the Adams company and the fact that executions issued on the judgments had been returned by the officer in whose hands they had been placed, "no property found." It was further averred that about June 25, 1918, the defendant American company was organized for the express purpose of taking over and becoming the owner of all the property and rights of the Adams company and other express companies doing a railroad express company business in the United States; that the Adams company on that date transferred and turned over all of its property of every kind, character and description in Kentucky and the United States to the American company and received as the only consideration therefor capital stock of the American company of the par value of $8,000,000; that the Adams company in this transfer and sale delivered to the American company, property situated in Kentucky of the value of many thousands of dollars, including its office and business in the County of Harlan, from which a monthly income of about $10,000 was realized. It was further averred that the American company was indebted to the Adams company on account of dividends due on the stock it transferred to the Adams company in a sum in excess of the amount of the judgment.

On motion of the Adams company the summons issued against it and which was executed on the agent for the American company at Harlan, Kentucky, was quashed upon the ground that he was not at the time of the service of the summons the agent of the Adams company and no appeal is prosecuted from this order.

A general demurrer to the petition filed by the American company was also overruled and thereupon it filed its answer in which after denying in a general way that it was organized for the purpose of taking over the property and business of the Adams company and other express companies and also that the Adams company had transferred to it all of its property of every kind, character and description admitted that "in good faith without fraud and for a valuable consideration the Adams company had transferred and sold its property in the state of Kentucky to the American company."

It further denied that it was indebted to the Adams company in a sum in excess of the judgments as dividends on the stock delivered by it to the Adams company or in any sum on account of or growing out of any other transaction or that it held any property or choses in action or evidences of debt in which the Adams company or its stockholders had any interest.

The affirmative matter in this answer was by agreement denied of record, and so the petition and answer constitute the only pleadings in the case.

Thereafter the depositions of Clark and Degnon, the only witnesses who testified in the case, were taken. Clark, who was an officer of the American company, testified that: On July 1, 1918, the American company purchased from the Adams company and other express companies all of their tangible property used or formerly used in express transportation operations throughout the United States, including the State of Kentucky:

"Q. I believe that you may state in your own way for the information of the court a brief history leading up to the sale and transfer of the property of the Adams company in Kentucky to the American company? A. After continued negotiations at Washington, the Director General of Railroads advised the executives of the express companies that he would not deal with more than one express company to operate over all federal controlled lines in the United States. Therefore, the old express companies were estopped from the right to carry on the express transportation business beyond June 30, 1918. Thereupon a new corporation was organized by the name of the American Railway Express Company which was successful in concluding a contract with the United States Railroad Administration for the operation of the express service over federal controlled lines throughout the United States, such contract to become operative on July 1, 1918.

The old express companies having no use for the tangible property used by them in the express transportation business and the new company having great need for this identical property, which in many respects is peculiar to the express companies negotiated for the sale, the American Railway Express Company contracted for the purchase of this tangible property used in express transportation over all the lines formerly operated by the old express companies, and this purchase and transfer of this tangible property was effected at midnight June 30, 1918, for a valuable consideration on the part of the American Railway Express Company, thereby enabling it to continue the express transportation business without interruption.

Q. I will ask you to state whether or not the Adams Express Company as a corporation, or rather a joint stock company, is or not still in existence with executive officers? A. The Adams Express Company is still in existence as a separate entity, with executive offices and officers in New York City.

Q. Is there or not any contract in existence between the Adams Express Company and the American Railway by the terms of which the American Railway Express Company has agreed, assumed, contracted or undertaken to pay the liabilities, debts and judgments of the Adams Express Company? A. There is not and has not been such a contract.

Q. On July 1, 1918, or about that date, did the American Railway Express Company own any property or have any assets of its own before the property of the other express companies was transferred to it? A. It had not.

Q. What other express companies besides the Adams transferred their property to the American Railway Express Company? A. The Adams Express Company, the American Express Company, the Southern Express Company, Wells Fargo & Company, Great Northern Express Company, Northern Express Company and Western Express Company sold their tangible property used in the express operations to the American Railway Express Company.

Q. What was the whole consideration for this property purchased from these various express companies by the American Railway Express Company? A. Approximately $33,000.

Q. And what was the invoiced or agreed price of the property of the Adams Express Company

turned over to the American Railway Express Company? A. The depreciated book value of each individual piece of property on July 1, 1918.

Q. And what did it amount to in dollars? A. Why, in round numbers, $8,000,000.

Q. I believe you have stated that the Adams Express Company bought some stock and paid cash for it from the American Railway Express Company. How much of the stock did the Adams buy and pay cash for? A. In round numbers between three-quarters of a million and one million dollars.

Q. What did the American Railway Express Company do with the three-quarters of a million dollars which you say the Adams stockholders paid for stock in the American Railway Express Company? A. The cash subscription which was made to the American Railway Express Company for capital stock was used as a working fund with which to carry on its business, purchase supplies and generally to maintain its property.

Q. Can you reasonably find out the value of the Adams Express Company's property that was turned over in Kentucky to the American Railway Express Company? A. No. I cannot. It was all bulk.

Q. To whom was the eight million dollars or more stock of the American Railway Express Company, which represented the value of the property of the Adams Express Company, turned over? A. To the Adams Express Company.

Q. Was it turned over to the individual stockholders of the Adams Express Company or to the Adams Express Company as a joint stock company? A. To the Adams Express Company as a joint stock company."

THOMAS H. DEGNON, an officer of the Adams company, testified as follows:

"Q. Please state whether or not you know whether the Adams Express Company ceased to do an express business on July 1, 1918. A. It did cease.

Q. Is the Adams Express Company still in existence? A. Yes.

Q. Please state whether or not, if you know, the Adams Express Company at the time of the transfer of the property used in the express business in the United States to the American Railway Express Company transferred its entire assets, tangible and intangible of every description to the American Railway Express Company? A. It did not.

Q. Was there any assets reserved by it at the time of this transfer? A. There were.

Q. Has the Adams Express Company in your estimation still assets sufficient to meet its outstanding liabilities? A. I believe it has.

Q. Has it any tangible property to your knowledge? A. It has.

Q. Has it any real estate to your knowledge of which it is the owner? A. Yes.

Q. Did the Adams Express Company on July 1, 1918, retain any property of any kind in Kentucky that it owned at that date? A. It did not.

Q. Has it now any property of any kind in Kentucky? A. It has none to my knowledge.

Q. This suit is to force the collection of judgments rendered by the Harlan Circuit Court, Harlan, Kentucky, against the Adams Express Company, amounting to $4,110.10, including costs. Has the Adams Express Company thought any-

thing about paying these judgments or does it not intend to pay them unless it is forced to do so? A. I don't know anything about it.

Q. About what value of property did the Adams own in Kentucky prior to July 1st, and up to that date—1918? A. I have no knowledge or, rather, recollection.

Q. It did have a business in Kentucky and had property in Kentucky? A. It did.

Q. What kind of property did it own in Kentucky? A. Principally horses, wagons, equipments of various kinds, and, I believe, some real estate.

Q. How was that real estate transferred—by deed or otherwise? A. By deed.

Q. What did the Adams Express Company receive for this property in Kentucky which it transferred to the American Railway Express Company? A. Shares of stock of the American Railway Express Company, either received or to be received.

Q. Were the stockholders of the Adams Express numerous—many of them or only a few? A. Approximately three thousand.

Q. Is the Adams Express Company engaged in any kind of actual business now? A. No.

Q. For what purpose does it still retain its organization as a joint stock company? A. It still has assets undisposed of and also obligations to be settled.

Q. It is retaining its organization for the purpose of winding up its affairs only, is that what I understand you to say? A. That is all it has been doing up to this time.

Q. Do you know what understanding either in writing or otherwise, there existed between the

American Railway Express Company, after July 1, or on July 1, 1918, for the payment of the outstanding obligations of the Adams Express Company at that date? A. There was an understanding between them.

Q. If you know, state what that understanding was in that regard? A. The understanding defined what the American Railway Express Company would undertake to settle outstanding obligations of the Adams Express Company solely for Adams Express Company's account without the assumption of any liability on the part of the American Railway Express Company, the Adams Express Company keeping the American Railway Express Company in funds sufficient to do so.

Q. Do you know the amount of cash for the purchase of the stock of the American Railway Express Company paid by the Adams Express Company? A. Nine hundred thousand and some odd dollars.

Q. Did the Adams Express Company receive from the American Railway Express Company any cash or property consideration for any of its tangible property which the Adams turned over to the American Railway Express Company? A. Not to my knowledge.

Q. The only thing that the Adams company got from the American was stock? A. That is all.

Q. State whether or not in your judgment the Adams Express Company in Kentucky owned and turned over to the American Railway Express Company tangible property of the value of over $5,000? A. I believe so.

Q. Was this sale and transfer of this property in Kentucky by the Adams Express Company

made with the intention to defraud any creditors of the Adams Express Company? A. I do not believe so.

Q. Approximately to the best of your judgment what is the value of the real and tangible property now owned by the Adams Express Company which it did not sell and transfer to the American Railway Express Company? A. According to the recent compilation by accountants, the Company had property of value in round figures $2,700,000 in excess of liabilities which it did not sell or transfer to the American Railway Express Company.

Q. And does the Adams Express Company still own this property? A. The Adams Express Company still owns that property."

On this evidence the outstanding facts in this case may be stated in this way:

(a) There was no merger or consolidation of the two companies. The American simply bought, and paid for in its stock, all of the property of every kind, character and description employed by the Adams in the express business, *and took its place as an express company.* The transaction being untainted by actual fraud of any description.

(b) The American did not pay to the Adams any consideration except the issual of its stock to the Adams to the amount of $8,000,000 *and this stock although delivered to the Adams company was delivered to it, as we will assume, to be held by it as trustee for the use and benefit of its stockholders or to be delivered by it to the stockholders in proportion to their respective rights.*

(c) Before the sale, the Adams had ample tangible property, including real estate, in this State out of which the judgment could have been satisfied, and after the sale it had in this State no property of any kind or character that could be subjected to the satisfaction of the judgment: *nor were any of its stockholders residents of this State.*

(d) The Adams had in New York or some other State after the sale assets sufficient in value to satisfy the judgment, *but whether these assets could be subjected to its payment is not certain, nor is it material whether this could or not be done.*

(e) Immediately upon the sale, the Adams ceased to do business as an express company leaving no agent in the State for the service of process but retained its corporate identity *merely for the purpose of winding up its affairs.*

(f) The sale and transfer simply had the effect of putting the American company in consideration of its stock in the possession of all the property used by the Adams and other express companies in the conduct of their business *and it continued to carry on the express business just as the selling companies had carried it on before the sale.*

(g) *We may also here state that under our constitution, and statutes, the Adams although a joint stock company organized under the laws of New York is to be treated in this State as a corporation. Whether its stockholders are personally liable for its debts, as in the case of a partnership, we are not able to say as we are not*

advised concerning the statutes of New York or the articles of association under which it was organized. And so, under these circumstances, we will treat it as a corporation.

On these facts, the precise question before us is: will a purchasing corporation that has paid the full purchase price *to the selling corporation* by the issue of its stock to it be responsible in law to the extent of the value of the property received, for the *debts or liabilities*, whether liquidated or unliquidated, or sounding in contract or tort, *that were outstanding against the selling corporation at the time of the sale*, when the effect of it is to leave the selling corporation without any property in the state in which the liability accrued to satisfy it, although except for the sale it would have had ample property in the State, that could have been subjected to the payment of the liability; and may have property in some other State that could be subjected to the payment of the liability.

Questions concerning the responsibility of the purchasing corporation for the debts and liabilities of the selling corporation have come before the courts of the country in many cases, and it is held practically without dissent that although the purchasing corporation does not assume the payment of any of the debts or liabilities of the selling corporation, it will yet be made responsible for them if there was no consideration for the sale, or if it was not in good faith but for the purpose of defeating the creditors of the selling corporation, or where there has been a merger or consolidation of the corporations, or where the purchasing corporation took over from the stockholders, all of the stock of the selling corporation, or where the transaction amounts to a mere

re-incorporation or re-organization of the selling corporation.

It is also generally agreed that whe nthese conditions exist the purchasing corporation will be responsible for all the debts and liabilities of the selling corporation without reference to whether these debts or liabilities were created by contract or arose out of tort, or were liquidated or unliquidated.

It is equally well settled that when the sale is a bona fide transaction, and the selling corporation receives money to pay its debts, or property that may be subjected to the payment of its debts and liabilities equal to the fair value of the property conveyed by it the purchasing corporation will not in the absence of a contract obligation or actual fraud of some substantial character be held responsible for the debts or liabilities of the selling corporation. Many illustrative cases fully supporting these propositions may be found in Vol. 5, Thompson on Corporations, Sec. 6517; 7 R. C. L., p. 180; 10 Cyc. 307; Notes in 11 L. R. A. (n. s.) 1119; 32 L. R. A. (n. s.) 616; 47 L. R. A. (n. s.) 1058.

The facts of this case do not however bring it directly within these rules, about which there is no disagreement in the authorities and so the American company can only be made liable, if at all, for the payment of these judgments upon the grounds (*a*) that it was a mere continuation of the Adams under a new name; (*b*) that the only consideration paid to the Adams was paid in the capital stock of the American company and (*c*) that the Adams company on account of the sale has no property or assets of any kind or character in this State that can be subjected to the payment of the judgments. These questions we will now proceed to consider.

In *Camden Interstate Railway Co.* v. *Lee*, 27 Ky. L. R. 75, the facts were these: Lee in a suit to recover

damages for personal injuries obtained in February, 1901, a judgment against the Ashland & Catlettsburg Street Railway Co. upon which an execution was issued and returned "no property found." Rose Hoffman also had a judgment, in a damage suit in February, 1901, against this company. While these suits were pending J. M. Camden purchased the stock of the street railway company under an arrangement with the stockholders by which they agreed to take stock in the Camden Interstate Railway Company in exchange for the stock they held in the street railway company and thereafter a deed was made by the street railway company to the Camden Interstate Railway Company conveying to it all of its property. As a result of this, Lee and Hoffman were unable to obtain satisfaction of their judgments against the street railway company and thereupon sought to make the Camden Interstate Railway Company liable for the judgments. In the sale the Camden company did not assume the payment of any of the debts or liabilities of the street railway company. In holding the Camden company liable, the Court said:

> "The sum of the transaction was that Camden either owned in his own right all the stock of the street railway company by way of purchase, or controlled it under contracts by which the stockholders agreed to take stock in the new company for the stock which they held in the old, and while he thus controlled all the stock in the street railway company, he caused that company to deed all of its property and franchises to the Camden Interstate Railway Co., and thus the stockholders in the street railway company became stockholders in the interstate railway company. In this way the stockholders in the street railway company put

all of their property and franchises in the hands of the interstate railway company, and became stockholders in that company in lieu of the street railway company. By this means, the interstate railway company swallowed up or absorbed the street railway company."

In *Harbison-Walker Refractories Co.* v. *McFarland's Admr.*, 156 Ky. 44, it appears that McFarland's administrator obtained a judgment against a corporation styled Harbison & Walker Company, that was solvent when the liability that resulted in the judgment accrued. After the accrual of the liability the owners of the stock of this company incorporated a new company, and thereafter the stockholders in both of these companies incorporated the Harbison-Walker Refractories Company for the purpose of taking over the property of the other two corporations and doing a like business. Pursuant to this arrangement the Harbison & Walker Company transferred all of its property to the new Harbison & Walker, and this corporation in turn transferred all of its property to the Refractories Company. These several transfers were accomplished merely by the purchasing companies' taking over the assets of the selling companies, and issuing stock of the buying companies to the stockholders of the selling companies in lieu of their stock. After this, the administrator of McFarland brought suit against the Refractories Company to compel it to pay the judgment he had obtained against the Harbison Walker Company; and, in holding it liable for this judgment, the Court said:

"The 'Harbison & Walker Company, Southern Department,' as well as the Portsmouth Harbison-Walker Company, were, in reality, merged into the greater corporation, the Refractories Company, and the method of accomplishing that end

cannot change the rights of creditors, since it resulted in a transfer of all the assets of the first-named company to the Refractories Company, without leaving with the selling company the purchase price of the assets so sold. In the case at bar the Refractories Company took over all the assets of the 'Harbison & Walker Company, Southern Department,' which was the original debtor, leaving it a mere shell, and without leaving with it any money or property whatever as a consideration for the sale of its assets. There was no liquidation of the 'Harbison & Walker Company, Southern Department,' by selling its assets and paying its debts; on the contrary, there was a transfer of all of its property to the Refractories Company without any attempt to pay appellee's debt. A subsidiary corporation cannot thus escape the payment of its liabilities. It is true these sales and transfers were all made by deeds of conveyance, and that the corporation had the right to sell its assets in that way, if it chose so to do; but the decision of this case depends upon the broad equitable principle that where one corporation takes over the assets of another corporation, without paying to it any consideration therefor, as is the fact in this case, the absorbing corporation takes the assets of the absorbed corporation *cum onere*."

In Justice's *Admr.* v. *Catlettsburg Timber Company*, 168 Ky. 665, a creditor of the Catlettsburg Timber Company, sought to hold liable the Dawkins company that purchased the assets and property of the Catlettsburg company, paying therefor a fair and valuable consideration in money. In holding that the purchasing cor-

poration was not liable for the debts of the selling corporation the Court said:

> "The law is well settled that where one corporation voluntarily conveys all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation, who may follow the corporation's assets, or the proceeds thereof, into the hands of whomsoever they can trace them, and subject them to the payment of the corporation's debts, except as against a *bona fide* purchaser for value. The rule does not operate, however, to disturb sales made in good faith, and for value, or in satisfaction of valid liens."

To the same effect is *Martin* v. *Sulfrage*, 159 Ky. 363; *Carter Coal Co.* v. *Clouse*, 163 Ky. 337; *Kentucky Distilleries and Warehouse Company* v. *Webb's Executor*, 181 Ky. 90; *Louisville and Nashville Railroad Co.* v. *Biddell*, 112 Ky. 494.

The case of *Chesapeake & O. Railroad Company* v. *Griest*, 85 Ky. 619, apparently laid down principles somewhat at variance with these later cases but what was said in the *Griest* case was not approved or followed in any of them.

In *Jennings, Neff & Co.* v. *Ice Co.*, 128 Tenn. 231, 47 L. R. A. (n. s.), 1058, it appears that the Crystal Ice Company, a Georgia corporation, transferred all of its property to the Atlantic Ice & Coal Company, a Virginia corporation, and the Crystal Ice Company ceased to do

business but retained its corporate entity for the purpose of winding up its affairs. Prior to this sale, Jennings, Neff & Co. had brought suit against the Crystal Ice Company, and this suit was pending at the time of sale. After the sale, it obtained judgment against the Crystal company, upon which execution issued and was returned "no property found."

In the transaction, the Atlantic company assumed the payment of certain debts of the Crystal company, but not the debt of Jennings, Neff & Company. Aside from this, the only consideration received by the Crystal company for its tangible property in Tennessee, which was valued at about $300,000.00, was stock and bonds of the Atlantic company, which were distributed to the stockholders of the Crystal company. In a suit by Jennings, Neff & Company to make the Atlantic company liable for its judgment against the Crystal company, the Court after stating the familiar doctrine that corporate assets are a trust fund for the payment of the debts of the corporation, a principle that has been time and again announced by this Court, said:

> "It follows that when this purchasing corporation took over in exchange for its own stock and bonds the assets of the other, and permitted these securities which it had substituted for the visible, tangible property of the selling corporation to be distributed among the shareholders of the latter, without provision for the creditors of the latter, it thereby became a party, with full notice, to diversion of a trust fund. As such, the purchasing corporation holds the property so acquired impressed with the same trust with which said property was originally charged, and the purchasing corporation is liable to the creditors of the selling corporation to the extent of the value of the property thus obtained.

Creditors of the old corporation cannot be required to look alone to the stock and bonds which were substituted for the real, tangible assets of that corporation. The value of securities so substituted is more or less problematical, and creditors should not be forced to surrender their claim against available visible assets, and transfer such claim to new securities. Their remedy cannot thus be hindered and impaired for the benefit of stockholders.

* * * * * * *

Furthermore, these were securities of a foreign corporation, and were distributed among non-residents of the State, and we are unwilling to approve any device by which tangible property of a corporation located here and subject to the debts of that corporation can be withdrawn from the reach of creditors and distributed among non-resident stockholders. Corporate creditors may not be thus deprived of available security for their claim and forced to resort to difficult and inconvenient litigation in foreign States."

In *Grenell* v. *Detroit Gas Co.*, 112 Mich. 70, a judgment creditor of the Michigan Gas Company sought to make the Detroit Gas Company, the purchaser of the Michigan Gas Company, liable for a judgment against the selling companies. In that case the Detroit Gas Company was organized for the purpose of taking over the business of the Michigan Gas Company, and pursuant to this arranagement it purchased all of the property and assets of the Michigan Gas Company and paid for the same by its shares of stock. The Court said:

"If this transaction be viewed in the light that the defendant appears to desire it to be, viz., that

these corporations are separate entities, and that the Detroit Gas Company purchased the property of the Michigan Gas Company, yet the bill shows that such purchase included all of the property of the vendor. It must have known, or, if not, it was its duty to understand, that nothing was reserved to pay outstanding indebtedness, if there were any. It paid nothing to its vendor for this plant, but dealt with its stockholders, paying to them, in its own capital stock, the price of its purchase; thus, in effect, closing out the corporate business, and dividing its assets among its stockholders. Under such circumstances, we think a legitimate inference is that the purchase was made subject to the application of so much of the property as might be necessary to the payment of the debts of the Michigan Gas Company, if not with the understanding that all debts should be paid by the purchaser. Again, a corporation cannot sell all of its property, and take in payment stock in a new corporation, under an arrangement that has the effect of distributing the assets of the vendor among its stockholders, to the exclusion and prejudice of its creditors; and a company making such a purchase, in consideration of an issue of its own stock to such stockholders, takes the property subject to the rights of creditors. Such an arrangement is a diversion of the trust fund.

It is said that there is nothing to show an intention to defeat the creditors of the Michigan Gas Company, as this was not a liquidated claim at the time this transfer was made. Under the arrangement, the promoters and stockholders of the Detroit Gas Company knew that it was getting

all of the property of the Michigan Gas Company, without provision for its debts, if there were any. It was bound to know that this property was charged with such debts, and ought not to be distributed among the stockholders to the exclusion of creditors. It was a party, then, to a diversion of the trust fund, and, having in its possession such fund, holds it subject to the payment of debts. It canot be called a *bona fide* purchaser of the property, as against existing creditors."

Another instructive case is *Hibernia Insurance Company* v. *St. Louis and New Orleans Transportation Company*, 13 Fed. Rep. 516; in that case it appears that the Babbage Transportation Company sold all of its property to the St. Louis and New Orleans Transportation Company in consideration of stock in the latter company and the payment of certain of its debts. The stockholders in the two companies were substantially identical. The suit was to require the purchasing corporation to pay a debt due by the selling corporation and the Court said:

"The fair inference from the transaction is that the old company was about to be dissolved, and to cease to be. It was to be absorbed by the new company. This is the inevitable consequence of the formation of the new company, composed substantially of the same persons, to transact the same business at the same places, and with the same property. By the transfer, the creditors of the old company were deprived of the means of enforcing their claims. Probably no officers of the old company have since been elected, and it is to be presumed that none will be. This being so, it is at least doubtful whether service of process

could be obtained so as to procure a judgment at law against the old company. And if a judgment were obtained, it could not be collected out of any assets in the possession of the old company because it had turned all its assets over to the new company. It has received, it is true, paid-up stock in the new company, but that has doubtless been disposed of; or, if it has not been, it may at any moment be transferred. Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed upon the market.

A distinction with respect to transactions of this character exists between a corporation and a natural person. A natural person may sell all his property for a fair consideration, if the transaction is *bona fide*, and the buyer will not be required to take care that the seller provides for and pays all his debts. A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of the means of paying its debts, but may deprive itself of corporate existence, and place itself beyond the reach of process at law. At all events, equity cannot permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts; and that is the exact case now before us.

Here was a corporation engaged in a profitable business, and owning and possessing property valued at $92,000 exclusive of its franchise. It

owed debts confessedly amounting to more or less than the value of its property. It ceases to transact business. Its stockholders organized themselves into another corporation, and all the property is transferred from the old to the new. It matters not that the stockholders in the two companies may not be precisely identical. We are not prepared to say that it would make any difference if the members of the new company were none of them interested in the old. The thing which we pronounce unconscionable is an arrangement by which one corporation takes from another all its property, deprives it of the means of paying its debts, enables it to dissolve its corporate existence and place itself practically beyond the reach of creditors, and this without assuming its liabilities. The fact here, however, appears to be that the owners of the two corporations are substantially identical, and hence there is a still stronger case in equity."

Another very pertinent case is *Altoona* v. *Richardson*, 81 Kan. 717. In that case the Richardson Gas and Oil Company, a corporation, at a time when it was indebted to the City of Altoona transferred all its property to the Altoona Portland Cement Company in consideration of $600,000 of the common stock of the later company which continued the same business the Richardson Company had been engaged in. Thereafter the city sued and obtained judgment against both companies for its indebtedness.

There was no serious question as to the liability of the Richardson Company but the Altoona Company contended that it occupied the attitude of an ordinary purchaser of property and not having contracted to pay

the indebtedness of the Richardson Company it was under no obligation to do so, on the other hand the city insisted that the transaction between the two corporations was a virtual if not a technical consolidation—that the new company was a successor of the old and liable for its debts.

In considering the case and holding the purchasing corporation liable the Court said:

> "In the present case it was not positively and directly proved that the old company distributed among its stockholders the stock in the new company which it received in consideration of the transfer of its property, but that is inferable from the evidence."

And further said:

> "We think it consistent with the weight of authority and in accordance with sound reason to hold that the equitable right of the creditor to look for payment to the property of a debtor corporation is superior to any title that can be acquired through such a transaction as that here disclosed. We affirm the judgment upon the ground that where a corporation becomes practically extinct, transferring all its assets to another and receiving in return stock in the other corporation, which succeeds to its business, the new corporation is liable, to the extent of the value of the property acquired, for the debts of the old one. Such an arrangement is essentially a merger, and should be attended with the same consequences as a consolidation."

In the *Editorial Note to Luedecke* v. *Des Moines, Cabinet Company*, 32 L. R. A. (n. s.), p. 617, it is said, that:

> "The transfer of one corporation to another may amount to a merger in fact although the corporate existence of the transferrer corporation continues. In such case equity looks past the form and at the real effect of the transaction and by an application of the trust-fund doctrine holds the transfer liable to the extent of the assets received as in such case it is not a *bona fide* purchaser for value."

In *Chicago Railroad Company* v. *Taylor*, 183 Ind. 240, the Court said:

> "Where the property is taken without compensation to the original company other than the issuance of stock to it in the new organization the latter should be charged with such unpaid claim as exist against the property taken, at least in an amount equal to the value of such property."

Many other cases announcing principles similar to those set forth in the ones quoted from might be referred to but those noticed are amply sufficient for the purposes of this case and give abundant support to the conclusion we have reached that the American Company should be held liable for the claim sued on.

It is true that in the cases referred to it appeared that the purchasing corporation had bought all the assets and property of the selling corporation, while in this case it appears that the selling corporation has some property in another State but we do not regard this circumstance as sufficient to defeat the wholesome principle running through these cases that the rights

of creditors are superior to the rights of stockholders and a corporation will not be allowed to defeat its just obligations by sale or transfer of its property for no other consideration than stocks or bonds in the purchasing corporation. We have merely extended this wholesome principle for the better protection of creditors and this without prejudice to the rights of selling or purchasing corporations that desire to do what is just by the creditors of the selling corporation.

A careful consideration of the facts in all these cases and the conclusions of the courts makes it clear that the circumstances that *seas* ultimately seized hold of to make the purchasing corporation liable, was that the selling one was paid for its property in the stock of the purchasing corporation, and the property of the selling corporation to which the creditors might look with certainty for the payment of their debts was turned over to the purchasing corporation; and cases involving questions like the one we have, disclose the further fact, that when one corporation sells its property and business to another, it is usually the case, that the selling corporation takes its pay in the stock of the purchasing concern.

But the Court looking through the various forms invented to impart not only validity to the transaction but to save the purchasing corporation from liability for the debts of the selling one, have in almost every case in which the selling corporation received nothing more than stock, held the purchasing corporation liable for the debts of the selling corporation; when however money or property of fair value was delivered as the purchase price, the purchasing corporation in the absence of fraud or contract obligation was relieved from liability.

All the cases also hold that where there is a merger, or consolidation or re-incorporation or re-organization

and a continuance of the business under a new name the corporation taking over the assets and property of the corporation extinguished for all practical purposes will be liable for its debts, and as before said, in virtually all this class of cases, the corporation that went out of business was paid for its property in stock of the new corporation.

Keeping these rulings in mind it is difficult to find any substantial difference between the methods of absorption often employed, as in the case of a merger or re-incorporation or re-organization and a straight out sale like the one here in question when the selling corporation gets nothing but stock in the purchasing one.

It is true there is no direct evidence that the stockholders of the Adams received or will receive in exchange for their stock the stock of the American that was delivered as shown by the evidence to the Adams but it is fair to, and we will, assume that this stock was turned over to the Adams for distribution to its stockholders as their rights may appear because they owned the whole beneficial interest in the property that was given up for this stock and the clear inference is that the Adams as a corporate entity holds this stock in trust for its shareholders or to be delivered to them.

Neither should it be overlooked that the record shows that the American was organized for the sole purpose of taking over the property and business and pursuant to this arrangement did, take over the business and all the property employed therein of the Adams and the other express companies and continued under a new name and a new organization the precise business they were engaged in, nor is it open to doubt that the great bulk of its stock is owned by the stockholders in these old companies although there may be many new share holders. Indeed it would not be wide of the mark to

say that the American under a new name and new organization was merely a continuation of all the old companies as this was in effect the result of the sale and transfer of the business and property.

But it is said that the Adams is yet a corporation and owns property more than sufficient to satisfy its debts. It is true that it yet has a corporate existence but no suit can be maintained against it in this state and all of its property that had a situs in this state has been taken from it. So far as Kentucky creditors are concerned it is nothing more than a mere shell and a very empty one at that. If it owns tangible property of value none of it is in this state and more than likely it has none outside the state that can be seized and subjected by pursuing creditors. At any rate it is plain that the creditors in this state in order to make his debt would be required, to go to the State of New York, and find there if he could, property to satisfy his debt, and then resort to the courts of New York to try to collect it. We say this because the Adams company so far as this record shows has no disposition to pay this debt and we may assume will resort to every possible means to defeat its collection.

Of course, a corporation may sell its property and all of it of every kind, just as any natural person may and when it does this and receives its fair value in money to pay its debts, or property that the creditor can subject to the payment of its debts, a purchaser in the absence of a contract obligation cannot be held for the debts and liabilities of the selling corporation.

But when the selling corporation disposes of all its property and takes for it shares of stock in some other corporation and both the buyer and seller refuse to pay the debts of the seller it is perfectly plain that the rights of creditors of the seller have been prejudiced by the sale, as to them the sale is constructively fraudulent and for

this reason courts, will hold the purchasing corporation liable for the debts of the selling one.

The substantial difference between a corporation and an individual so far as the sale of all its or his property is concerned, is that the corporation is a creature of the law. There is no personal liability. All it has for the payment of its debts is its property and assets and the law, for the protection of creditors has impressed this property with a trust character for the payment of debts and said that the corporation holds it for the benefit of its creditors and when it parts with this property getting in return nothing the creditor can subject, the law will follow the property into the hands of the taker and make it liable to the extent of the value of the property received.

When the American bought the Adams, that company had for years been engaged in an extensive business throughout the United States and the American must have known that it had liabilities, but no provision whatever was made for their payment and it now says to the creditors of the Adams in Kentucky, if you want your money go to the State of New York and try to get it. We will not give our sanction to a scheme like this, and the conclusion we have reached is supported by abundant authority.

Under all the facts and circumstances of this case, the American might well be held liable on the theory that it was merely a continuance of the old companies under a new name. We prefer however to put our decision upon the distinct ground that when one corporation foreign or domestic, takes over the business and property of another that had in this state sufficient tangible property subject to execution to satisfy all its debts in this state and pays for the property so taken over in nothing more than its stock, it becomes liable to state creditors of the selling corporation to the extent of

the value of the property it has received in the sale, although the selling corporation may retain its corporate entity for the purpose of winding up its affairs, and have in some other state, property that might be subjected to the payment of its debts and this upon the ground that such a sale is constructively fraudulent.

This rule is not an unreasonable or harsh one nor will it in any manner interfere with the sale by a corporation of its property and business or subject the purchasing corporation if it uses reasonable care as it may easily do to protect itself from the liabilities of the selling corporation. All it need do is to make arrangements in the articles of sale for the payment of the debts of the selling corporation to the extent of the value of its property conveyed or pay for this property in money or other things of value that the creditors of the selling corporation may look to for the payment of their debts.

In view of the multitude of various enterprises in which corporations are engaged and the fact that creditors can only look to the property of the corporation for the payment of their debts it is nothing more than just and reasonable that the corporation should not be allowed to dispose of its property and business without getting something in return to pay its debts.

In considering this case we have not thus far noticed the authorities relied on by counsel for the American Company, the principal one being *McAlister* v. *The American Railway Express Company*, 103 S. E. Rep. 129. In that case as in this the American Company took over the business and property of the Southern Express Company at the same time and for the same reason and under the same circumstances that it took over the property and business of the Adams Company.

McAlister in that case sought to make the American liable for a claim he had against the Southern. The facts

of the two cases are as nearly alike as the facts of two cases could well be, but the North Carolina Court reached the conclusion that the American Company was not liable, putting its decision upon the ground that the purchasing company in the absence of contract obligation or fraud cannot be held liable for the debts of the selling corporation when there has been no merger or consolidation and the selling corporation does not become extinct and retains sufficient property to pay its debts.

We do not however, find ourselves willing to agree with the North Carolina court although its decision finds some support in the authorities. We are well satisfied that the great weight of modern authority as well as the right of the case supports the conclusion we have reached.

Wherefore the judgment is affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 5.—October Term, 1926.

American Railway Express Company, Petitioner, *vs.* The Commonwealth of Kentucky. } On Writ of Certiorari to the Court of Appeals of the State of Kentucky.

[February 21, 1927.]

Mr. Justice McReynolds delivered the opinion of the Court.

Without opinion the Kentucky Court of Appeals affirmed a judgment by the Harlan Circuit Court against petitioner and in favor of the Commonwealth for the aggregate sum of forty-four judgments against the Adams Express Company theretofore granted on account of alleged defaults during 1916.

The Adams Company is a "joint stock association," organized under the laws of New York. For many years it operated as a common carrier of goods in Kentucky and other States and owned therein valuable property essential to the conduct of this business. In Kentucky it owned no other property.

The petitioner is a Delaware corporation, organized under an agreement of the interested parties for the purpose of taking over the business and operating property of all the principal express companies of the country by issuing stock to the several owners. Directly after its organization, and on July 1, 1918, it acquired the entire express business and all property connected therewith of the Adams Company and issued therefor several million dollars of its capital stock. (Like transfers were made by the other express companies.) The seller immediately ceased to operate in Kentucky and the purchaser continued the business. Neither company made any provision for paying the outstanding obligations of the Adams Company contracted in Kentucky; but the latter held in its treasury at New York the stock received from the purchaser, possessed other valuable property located there, and was solvent.

Respondent claimed that petitioner became liable for unsatisfied obligations of the Adams Company. After a full and fair hearing

upon pleadings and proof, the Court of Appeals sustained this theory but assigned no reason. That court, it is said, determined the same issues as here presented in *American Railway Express Co.* v. *Commonwealth of Kentucky*, 190 Ky. 636, and supported the judgment by an elaborate opinion. But the record now before us fails to show any reference whatever to that opinion when the present cause was decided.

The petition for certiorari affirmed that the cause involved the following questions of constitutional law and because of them asked a a review. We go no further than their consideration requires.

> (1) Whether it is a lack of due process of law for the Kentucky Court to deprive the petitioner of its property on the following assumptions which are unsupported by the record and contrary to fact; (a) that the Adams Express Company is a corporation; (b) that the State of Kentucky was a creditor of the Adams Express Company on June 30, 1918; (c) that the stock issued to the Adams Express Company was distributed by it among its shareholders.
>
> (2) Whether petitioner is denied the equal protection of the laws by a decision of a state court which holds that a corporation which pays cash for property is a holder for value but that a corporation which issues less than a controlling interest of its own stock for property is a donee, and takes such property subject to existing claims of the vendor's creditors.
>
> (3) Whether it is lack of due process for the state of Kentucky to enforce a rule that a *bona fide* purchaser for value of all the Kentucky property of a solvent vendor is liable to Kentucky creditors of the vendor to the extent of the value of the property acquired.
>
> (4) Whether a decision of a state court which is contrary to the common law, and justifiable only as an exercise of the state's police power, can be retroactively applied to affect vested rights.

The grounds upon which the Court of Appeals rested its judgment are not revealed—there was no opinion. Consequently, petitioner's argument which rests upon alleged assumptions is impertinent.

The record discloses no ruling that a corporation which pays cash for property holds for value but if property is acquired by issuing

less than a controlling interest of stock it takes subject to claims of the seller's creditors.

As there was no controlling statute the state court necessarily determined the rights and liabilities of the parties under the general rules of jurisprudence which it deemed part of the law of Kentucky and applicable in the circumstances. It went no further. No earlier opinion was overruled or qualified and no rule was given any retroactive effect. Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common. "The due process clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law." *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 165, 166.

The Kentucky court had jurisdiction and has determined only that under common law principles in the peculiar circumstances above narrated, where the facts were or might have been known to the purchasing corporation, it became liable for claims against the vendor resulting from transactions within the State. The action of the court followed a fair hearing, and there is no pretense that the challenged views were adopted in order to evade a constitutional issue. We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental "principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Booth* v. *Illinois*, 184 U. S. 425, 429; *Truax* v. *Corrigan*, 257 U. S. 312, 329.

It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 195; *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393; *Tracy* v. *Ginzberg*, 205 U. S. 170, 177; *Bonner* v. *Gorman*, 213 U. S. 86, 91; *McDonald* v. *Oregon R. R. & Nav. Co.*, 233 U. S. 665, 669.

Considering the circumstances disclosed by the record, there was nothing arbitrary or obviously contrary to the fundamental principles of justice in requiring the petitioner, organized for the purposes shown, to satisfy claims against the Adams Company which arose out of business within the State. The transfer of all the latter's property located in the State materially interfered with

the ability of Kentucky creditors to enforce their claims, and, as to them, might have been declared fraudulent. It seems clear that the State, without conflict with the Fourteenth Amendment, might have enacted through its legislative department a statute of precisely the same effect as the rule of law and public policy declared by the Court of Appeals, and its decision is just as valid as such a statute would have been. *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 548.

The above-expressed view is sufficiently confirmed by what this Court said in *Mutual Reserve Association* v. *Phelps*, 190 U. S. 147, 158, 159, which upheld the validity of a statute providing for service of process after a corporation had ceased to do business within and had withdrawn all agents from the State; and *Lemieux* v. *Young, Trustee*, 211 U. S. 489, 492, 495, and *Kidd, Dater Co.* v. *Musselman Grocer Co.*, 217 U. S. 461, 472, *et seq.*, which sustained the power of a State to impose liability for the seller's debts upon a purchaser of merchandise in bulk.

The judgment of the court below must be

Affirmed.

Mr. Justice SUTHERLAND and Mr. Justice BUTLER, dissent.

A true copy.

Test:

Clerk, Supreme Court, U. S.